THIS BOOK CONTAINS THE OFFICIAL REPORTS OF CASES

DECIDED BETWEEN

JANUARY 16, 2009 and JULY 1, 2009

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXVII

PEGGY POLACEK

OFFICIAL REPORTER

PUBLISHED BY
THE STATE OF NEBRASKA
LINCOLN
2016

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By Peggy Polacek, Reporter of the Supreme Court
and the Court of Appeals

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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JOHN F. WRIGHT, Associate Justice
WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
RICHARD D. SIEVERS, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge
WILLIAM B. CASSEL, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk
JANICE WALKER . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer	Paul W. Korslund	Beatrice
		Daniel E. Bryan, Jr.	Auburn
		Vicky L. Johnson	Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
Third	Lancaster	Jeffre Cheuvront	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen B. Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
		Robert R. Otte	Lincoln
Fourth	Douglas	J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	Omaha
		Marlon A. Polk	Omaha
		W. Russell Bowie III	Omaha
		Leigh Ann Retelsdorf	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Robert R. Steinke Alan G. Gless Michael J. Owens Mary C. Gilbride	Columbus Seward Aurora Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist John E. Samson William Binkard	Blair Fremont Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz Patrick G. Rogers James G. Kube	Wayne Norfolk Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Mark D. Kozisek Karin L. Noakes	Ainsworth St. Paul
Ninth	Buffalo and Hall	John P. Icenogle James D. Livingston Teresa K. Luther William T. Wright	Kearney Grand Island Grand Island Kearney
Tenth	Adams, Franklin, Harlan, Kearney, Phelps, and Webster	Stephen R. Illingworth Terri S. Harder	Hastings Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John P. Murphy Donald E. Rowlands James E. Doyle IV David Urbom	North Platte North Platte Lexington McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Brian C. Silverman Randall L. Lippstreu Kristine R. Cecava Leo Dobrovolny Derek C. Weimer	Alliance Gering Sidney Gering Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven B. Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester	Papillion
		John F. Steinheider	Nebraska City
		Todd J. Hutton	Papillion
		Jeffrey J. Funke	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Mary L. Doyle	Lincoln
		Laurie Yardley	Lincoln
		Jean A. Lovell	Lincoln
		Susan I. Strong	Lincoln
Fourth	Douglas	Stephen M. Swartz	Omaha
		Lyn V. White	Omaha
		Thomas G. McQuade	Omaha
		Edna Atkins	Omaha
		Lawrence E. Barrett	Omaha
		Joseph P. Caniglia	Omaha
		Marcena M. Hendrix	Omaha
		Darryl R. Lowe	Omaha
		John E. Huber	Omaha
		Jeffrey Marcuzzo	Omaha
		Craig Q. McDermott	Omaha
		Susan Bazis	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Marvin V. Miller	Wahoo
		Linda S. Caster Senff	Aurora

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
		Douglas L. Luebe	Hartington
		Kenneth Vampola	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard W. Krepela	Madison
		Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
		James J. Orr	Valentine
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		G. Glenn Camerer	Gering
		James M. Worden	Gering
		Randin Roland	Sidney

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth Crnkovich	Omaha
	Wadie Thomas	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Linda S. Porter	Lincoln
	Roger J. Heideman	Lincoln
	Reggie L. Ryder	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	City
Michael P. Cavel	Omaha
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
Ronald L. Brown	Lincoln
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 276

Ross David Agre
Caitlin Ruth Barnes
Francis William Barron III
P. Brian Bartels
Natalie Marie Baumgarten
Jason Bryan Bottlinger
Alison Margaret Brown
Michael Warren Chaloupka
Clinton Robert Collins
Jeffrey Robert Connolly
Alfred Eugene Corey III
Brian Anderson DeVaney
Blaine Edward Dickeson
Joshua Allen Diveley
Carrie Ann Doll
Brandon John Dugan
Jason Christopher Eley
Jason Mark Finch
Trevor Adam Fitzgerald
James Gregory Foley
Drew Justin Fossum
Morgan Smith Fox
Deborah Ashley Frison
Stephanie LeeAnn Gase
David John Hengen
Garrett James Horn
Marci Lynne Iseminger
Erika Marie Knapstein
Darin Jay Knepper
Mark Leland Kovarik
Eric Michael Lemp
Brittani Erin Lewit
Christopher Kai Loftus
Stuart Bradford Martens
Francis Joseph Martin
Chad Gerard Marzen
Ashley Elizabeth McMahon
Lindsey Ellen Mills
Michael Lawton Moran
Holly Theresa Morris
Kimberly Ann Mueller-Malone
Colin Andrew Mues
Patrick Dennis Murphy
Joshua Kyle Norton
Brody James Ockander
Peter Michael Parry
Matthew Warren Peterson
Kristina Janice Pfeifer
Norman Richard Pflanz
Heather Diane Quitmeyer
Justin Craig Rammell
Blake Thomas Richards
Patricia Diane Schneider
Charles Bradley Sellers
Cagney Allison Shattuck
Benjamin Israel Siminou
Nick Anthony Simon
Edwin Andrew Sisson
William Charles Slifkin
Casey Louis Taylor
Donald Lee Todd
Julie L. Tomka
Michael Chad Trammell
Benjamin David Vinci
Kevin LaMar Weaver

Cynthia Lynn Weber-Blair
Grace Ruth Willnerd
Cortney McKala Wiresinger

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No. S-07-1244: **State v. Aldaco**. Affirmed. Gerrard, J. Heavican, C.J., not participating.

Nos. S-07-1369 through S-07-1372: **In re Estate of Johnson**. Affirmed in part, and in part reversed and remanded with directions. Gerrard, J. Miller-Lerman, J., participating on briefs. Heavican, C.J., not participating.

No. S-08-032: **Piper v. Wilkerson**. Affirmed as modified. Connolly, J. McCormack, J., not participating.

No. S-08-102: **City of Scottsbluff v. Strong Constr. Co**. Reversed and remanded with directions. Wright, J.

No. S-08-215: **In re Guardianship & Conservatorship of Larson**. Affirmed. Miller-Lerman, J. Gerrard, J., participating on briefs.

No. S-08-409: **In re Interest of Sylena M**. Appeal dismissed. Wright, J. Miller-Lerman, J., participating on briefs.

Nos. S-08-437, S-08-438: **Skyline Woods Homeowners Assn. v. Broekemeier**. Affirmed in part, and in part reversed and remanded with directions. McCormack, J.

No. S-08-475: **Schleuter v. CBM Americas Food Service Part, Inc**. Affirmed. Wright, J.

No. S-08-476: **Fleeman v. Nebraska Pork Partners**. Reversed and remanded with directions. Stephan, J.

No. S-08-578: **State v. Tavis**. Affirmed in part, and in part reversed. Connolly, J.

No. S-08-991: **Alvarez-Meraz v. Department of Labor**. Reversed and remanded with directions. Stephan, J. Wright, J., participating on briefs.

No. S-08-1027: **Paisley, LLC v. Liberty Building Corp**. Affirmed as modified. McCormack, J.

No. S-08-1341: **Andersen v. Andersen**. Affirmed. Stephan, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-01-265: **State ex rel. Counsel for Dis. v. Sopinski**. Respondent reinstated to the practice of law in the State of Nebraska.

No. S-06-1116: **Looby v. Toman**. Motion of appellant for continuance overruled. Appeal dismissed. See Neb. Rev. Stat. § 25-1415 (Reissue 2008).

No. S-08-071: **Sears Mfg. Homes v. King**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-08-745: **Bowker v. Double "O"**. Affirmed. See, § 2-107(A)(1); *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

No. S-08-774: **State v. Deckard**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-855: **Hall v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-921: **State ex rel. Counsel for Dis. v. Halstead**. Motion of relator to dismiss formal charges sustained; formal charges dismissed.

No. S-08-930: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-973: **State v. Palomino-Duque**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-1009: **State v. Thompson**. On the court's own motion, appeal dismissed. See § 2-107(A)(2).

No. S-08-1019: **Hall v. Houston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-1045: **State v. Marshall**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

Nos. S-08-1117, S-08-1118: **State v. Leonor**. Motions of appellee for summary affirmance sustained; judgments affirmed. See § 2-107(B)(2).

No. S-08-1165: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-08-1271: **State v. Jones**. Motion of appellee for summary dismissal sustained. See § 2-107(B)(1).

Nos. S-08-1321, S-08-1322: **Papillion Rural Fire Prot. Dist. v. City of Bellevue**. Stipulations allowed; appeals dismissed.

No. S-09-058: **Waite v. Merritt**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. §§ 25-1912(3)(b) and 25-1329 (Reissue 2008).

No. S-09-107: **State ex rel. Bastie v. Crnkovich**. Respondent having complied with alternative writ issued by this court, the matter is deemed concluded.

No. S-09-172: **State v. Carter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. S-09-178: **State v. Carter**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(3) (Reissue 2008).

No. S-09-205: **State ex rel. Counsel for Dis. v. Henry**. Motion of relator to dismiss formal charges sustained; formal charges dismissed.

No. S-09-222: **State v. Epting**. Appeal dismissed. See § 2-107(A)(2). See, also, Neb. Rev. Stat. § 25-1912(1) (Reissue 2008); *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

No. S-09-352: **State v. Stark**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1912(1) (Reissue 2008). See, also, *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005); *State v. Parmar*, 255 Neb. 356, 586 N.W.2d 279 (1998).

No. S-09-395: **State ex rel. Counsel for Dis. v. Wintroub**. Motion of relator to dismiss sustained; formal charges dismissed without prejudice.

No. S-34-090001: **In re Application of Williams**. Applicant's request to take bar examination of February 2009 is granted.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-07-146: **S&L Farms v. Haarberg**. Petition of appellant for further review denied on February 19, 2009.

No. A-07-626: **State v. Wilson**, 16 Neb. App. 878 (2008). Petition of appellant for further review denied on January 14, 2009.

No. A-07-796: **State v. Parker**. Petition of appellant for further review denied on March 9, 2009, for lack of jurisdiction.

No. A-07-860: **State v. Benish**. Petition of appellant for further review denied on February 11, 2009.

No. A-07-1071: **Wolf v. Grubbs**, 17 Neb. App. 292 (2009). Petition of appellees for further review denied on March 18, 2009.

No. S-07-1072: **Sears v. Sears**. Petition of appellant for further review dismissed on February 19, 2009, as having been improvidently granted.

No. A-07-1105: **Charf v. Nebraska Dept. of Motor Vehicles**. Petition of appellee for further review denied on May 20, 2009.

No. A-07-1172: **Belitz v. Belitz**, 17 Neb. App. 53 (2008). Petition of appellant for further review denied on January 28, 2009.

No. A-07-1185: **ABC Native American Consulting v. Hatch**. Petition of appellant for further review denied on January 14, 2009.

No. A-07-1186: **Gangwish v. Gangwish**. Petition of appellant for further review denied on April 22, 2009.

No. A-07-1196: **State v. Hansen**. Petition of appellant for further review denied on February 19, 2009.

No. A-07-1262: **Citta v. DJV, L.L.C**. Petition of appellee for further review denied on February 11, 2009.

No. A-07-1275: **Cavanaugh v. Cavanaugh**. Petition of appellant for further review denied on February 19, 2009.

No. A-07-1316: **State v. Richardson**. Petition of appellant for further review denied on February 11, 2009.

No. A-07-1324: **McGinley-Schilz Co. v. Wunschel**. Petition of appellant for further review denied on February 11, 2009.

No. A-07-1328: **Johnson v. Eittreim**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-005: **Riverview Properties v. Q O Chemicals**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-022: **State v. Kelley**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-063: **State v. Dugan**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-069: **Zabawa v. Douglas Cty. Bd. of Equal.**, 17 Neb. App. 221 (2008). Petition of appellee for further review denied on February 19, 2009.

No. A-08-078: **State v. Muhammad**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-083: **Herrick v. Herrick**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-089: **Babel v. Schmidt**, 17 Neb. App. 400 (2009). Petition of appellees for further review denied on May 20, 2009.

No. S-08-102: **City of Scottsbluff v. Strong Constr. Co**. Petition of appellee for further review sustained on March 11, 2009.

No. A-08-103: **Maranville v. Dworak**, 17 Neb. App. 245 (2008). Petition of appellant for further review denied on February 19, 2009.

No. S-08-113: **State v. Dragoo**, 17 Neb. App. 267 (2008). Petition of appellee for further review sustained on January 14, 2009.

No. A-08-115: **Villas of Southwind v. Southwind Homeowners Assn**. Petition of appellee for further review denied on April 8, 2009.

No. A-08-118: **Nerison v. National Fire Ins. Co. of Hartford**, 17 Neb. App. 161 (2008). Petition of appellant for further review denied on January 22, 2009.

No. A-08-122: **Gonzalez v. Metropolitan Utilities Dist**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-140: **Rassette v. Rassette**. Petition of appellant for further review denied on January 14, 2009.

No. S-08-141: **Kuhn v. Wells Fargo Bank of Neb**. Petition of appellant for further review sustained on April 15, 2009.

No. A-08-161: **State v. Morgan**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-165: **Murante v. Cutchall**. Petition of appellee for further review denied on February 19, 2009.

No. A-08-176: **State v. Hillard**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-196: **In re Interest of Sarah L. et al.**, 17 Neb. App. 203 (2008). Petition of appellant for further review denied on January 14, 2009.

No. A-08-197: **State v. Heslep**, 17 Neb. App. 236 (2008). Petition of appellant for further review denied on January 14, 2009.

No. A-08-199: **Esch v. State Farm Mut. Auto. Ins. Co**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-200: **Zion Lutheran Church v. Mehner**. Petition of appellant for further review denied on March 27, 2009, as untimely filed.

No. A-08-202: **State v. Johnson**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-206: **Nielsen v. Daubert**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-210: **In re Adoption of Rylee R**. Petition of appellee for further review denied on January 22, 2009.

No. A-08-212: **Wade-Delaine v. Metro Area Transit**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-260: **In re Interest of Justice S. et al**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-267: **State v. Davis**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-278: **State v. Aguilar**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-282: **Marrison v. Green**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-286: **State v. Lopez**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-287: **Smith v. Brand Hydraulics Co**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-292: **State v. Davlin**. Petition of appellant pro se for further review denied on January 14, 2009.

No. A-08-295: **Archibald v. Clark**. Petition of appellant for further review denied on April 22, 2009.

No. A-08-304: **Williams v. Flagstar Bank**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-306: **Pate v. Gies**. Petition of appellant for further review denied on January 14, 2009.

Nos. A-08-323, A-08-324: **State v. Davis**. Petitions of appellant for further review denied on February 11, 2009.

No. A-08-333: **Coleman v. Kahler**, 17 Neb. App. 518 (2009). Petition of appellant for further review denied on June 17, 2009.

No. A-08-336: **State v. Gray**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-364: **Jensen v. Farmers' Ins. Group**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-372: **Swift v. KCC Feeding**. Petitions of appellant for further review denied on February 19, 2009.

No. A-08-378: **State on behalf of Riley R. v. Patrick L**. Petition of appellant for further review denied on June 24, 2009.

No. A-08-379: **State v. Le**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-382: **Sasges v. Eaton Corp**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-412: **State v. Harms**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-422: **In re Interest of Jacob T**. Petition of appellee for further review denied on February 19, 2009.

No. A-08-425: **State v. Morris**. Petition of appellant for further review denied on January 28, 2009.

No. A-08-453: **Rousseau v. Zoning Bd. of Appeals of Omaha**, 17 Neb. App. 469 (2009). Petition of appellant for further review denied on May 20, 2009.

No. A-08-494: **Phoenix Properties v. Biggs**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-496: **State v. Bridges**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-513: **Govier v. Govier**. Petition of appellant for further review denied on March 18, 2009.

Nos. A-08-515, A-08-516: **State v. Weibel**. Petitions of appellant for further review denied on January 14, 2009.

No. A-08-517: **In re Guardianship & Conservatorship of McDowell**, 17 Neb. App. 340 (2009). Petition of appellees for further review denied on June 4, 2009.

No. A-08-528: **In re Interest of Daniel L.** Petition of appellant for further review denied on January 14, 2009.

No. A-08-529: **In re Interest of Elizabeth L.** Petition of appellant for further review denied on January 14, 2009.

No. A-08-571: **Citimortgage, Inc. v. Clausen**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-573: **State v. Segura**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-579: **State v. Jackson**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-591: **State v. Gade**. Petition of appellant for further review denied on February 19, 2009.

Nos. A-08-605, A-08-606: **Nebco, Inc. v. Dodge Cty. Bd. of Equal**. Petitions of appellant for further review denied on March 11, 2009.

No. A-08-609: **State v. Flores**, 17 Neb. App. 532 (2009). Petition of appellant for further review denied on June 17, 2009.

No. S-08-623: **State v. Tucker**, 17 Neb. App. 487 (2009). Petition of appellant for further review sustained on May 20, 2009.

No. A-08-630: **Parent v. City of Bellevue Civil Serv. Comm.**, 17 Neb. App. 458 (2009). Petition of appellant for further review denied on June 24, 2009.

No. A-08-634: **Reinhardt v. Metropolitan Prop. & Cas. Ins. Co**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-638: **State v. Werth**. Petition of appellant for further review denied on March 11, 2009.

Nos. A-08-651, A-08-652: **In re Interest of Bianca H. & Eternity H**. Petitions of appellant for further review denied on January 22, 2009.

No. A-08-702: **State v. Betts**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-710: **State v. Frederick**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-715: **Renneke v. Health & Human Servs**. Petition of appellant for further review denied on February 12, 2009, as filed out of time. See § 2-102(F)(1).

No. A-08-718: **Portfolio Recovery Assocs. v. Young**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-720: **State v. Sepulveda**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-721: **State v. Mann**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-730: **State v. Obermiller**. Petition of appellant for further review denied on January 14, 2009.

No. S-08-735: **State v. Clark**, 17 Neb. App. 361 (2009). Petition of appellant for further review sustained on March 25, 2009.

No. A-08-738: **State v. Monaghan**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-739: **State v. Gilchrist**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-757: **State v. Patterson**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-760: **State v. Gilbert**. Petition of appellant for further review denied on February 19, 2009, as filed out of time.

No. A-08-765: **Vermaas Land Co. v. Fulton**. Petition of appellees for further review denied on May 6, 2009.

No. A-08-783: **State v. Bourn**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-784: **Halac v. Girton**, 17 Neb. App. 505 (2009). Petition of appellant for further review denied on June 24, 2009.

No. A-08-785: **Wilson v. Housing Auth. of City of Omaha**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-788: **State v. Kodad**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-790: **State v. Truksa**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-804: **State v. Williams**. Petition of appellee for further review denied on April 8, 2009.

No. S-08-819: **Brentzel v. Peterson**. Petition of appellant for further review sustained on June 17, 2009.

No. A-08-829: **State v. Nelson**. Petition of appellant for further review denied on March 11, 2009.

No. A-08-831: **Nesbitt v. Houston**. Petition of appellant for further review denied on January 14, 2009.

No. A-08-842: **State v. Hansen**. Petition of appellant for further review denied on May 5, 2009, for failure to comply with § 2-102(A).

No. A-08-865: **Haworth v. Compass Group**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-925: **State v. Brisby**. Petition of appellant for further review denied on February 27, 2009, as untimely filed.

No. A-08-934: **Prouse v. Prouse**. Petition of appellant for further review denied on April 15, 2009.

No. A-08-939: **State v. Perez**. Petition of appellant for further review denied on April 8, 2009.

No. A-08-941: **Schultz v. Western United Mut. Ins. Assn**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-943: **Villarreal v. Hansen**. Petition of appellant for further review denied on March 18, 2009.

No. A-08-947: **In re Interest of Shayla H. et al.**, 17 Neb. App. 436 (2009). Petition of appellee for further review denied on May 14, 2009.

No. A-08-950: **In re Interest of Khrystofer C**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-963: **State v. Kovar**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-987: **State v. Fenin**, 17 Neb. App. 348 (2009). Petition of appellant for further review denied on April 8, 2009.

No. A-08-993: **In re Interest of Nathaniel G. et al**. Petition of appellant for further review denied on April 22, 2009.

No. A-08-999: **State v. Tunin**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-1007: **In re Interest of Dannie H**. Petition of appellee for further review denied on June 23, 2009, as untimely filed.

No. A-08-1010: **State v. Burnett**. Petition of appellant for further review denied on June 4, 2009.

No. A-08-1030: **State v. Owen**. Petition of appellant for further review denied on March 18, 2009.

No. A-08-1059: **State v. Witmer**. Petition of appellant for further review denied on February 19, 2009.

No. A-08-1067: **State v. Utecht**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1071: **Davis v. Crete Carrier Corp**. Petition of appellant for further review denied on January 22, 2009.

No. A-08-1072: **State v. Hernandez-Medrano**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-1076: **Elkhorn Ridge Golf Partnership v. Mic-Car, Inc.**, 17 Neb. App. 578 (2009). Petition of appellants for further review denied on June 24, 2009.

No. A-08-1100: **State v. Means**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1121: **State v. Arellano**. Petition of appellant for further review denied on April 8, 2009.

Nos. A-08-1122 through A-08-1126: **State v. Walker**. Petitions of appellant for further review denied on May 20, 2009.

No. A-08-1127: **State v. Schmidt**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1128: **State v. Yates**. Petition of appellant for further review denied on June 24, 2009.

No. A-08-1136: **In re Interest of Enrique G**. Petition of appellant for further review denied on May 14, 2009.

No. A-08-1137: **State v. Journey**. Petition of appellant pro se for further review denied on May 8, 2009, for failure to file brief in support.

No. A-08-1140: **State v. Gonzales**. Petition of appellant for further review denied on June 4, 2009.

No. A-08-1148: **Eckhardt v. Neth**. Petition of appellant for further review denied on May 20, 2009.

No. A-08-1163: **State v. Tyler**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-1185: **State v. Robertson**. Petition of appellant for further review denied on May 6, 2009.

No. A-08-1194: **State v. Slonaker**. Petition of appellant for further review denied on June 10, 2009.

No. A-08-1197: **In re Interest of Willow S. et al**. Petition of appellant for further review denied on February 11, 2009.

No. A-08-1198: **State v. Zimmerman**. Petition of appellant for further review denied on June 4, 2009.

No. A-08-1208: **State v. Doyle**. Petition of appellant for further review denied on February 25, 2009.

No. A-08-1219: **State v. Pierce**. Petition of appellant for further review denied on June 4, 2009.

No. S-08-1220: **State v. Williams**. Petition of appellant for further review sustained on March 18, 2009.

No. A-08-1277: **Arrow "C" Ranch v. Board of Supervisors of Buffalo Cty**. Petition of appellant for further review denied on March 25, 2009.

No. A-08-1342: **State v. Bowman**. Petition of appellant for further review denied on June 17, 2009.

No. A-08-1344: **State v. Rugland**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-001: **State v. Graves**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-013: **Village of Hallam v. Farmers Cooperative**. Petition of appellee for further review denied on May 20, 2009.

No. A-09-067: **State v. Cash**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-109: **State v. Kitt**. Petition of appellant for further review denied on May 6, 2009.

No. A-09-140: **State v. Decoteau**. Petition of appellant for further review denied on May 14, 2009.

No. A-09-177: **Malcolm v. Department of Corr. Servs**. Petition of appellant for further review denied on June 17, 2009.

No. A-09-234: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on June 24, 2009.

No. A-09-240: **State v. Poole**. Petition of appellant for further review denied on June 24, 2009.

No. A-09-248: **Hineline v. Neth**. Petition of appellant for further review denied on May 6, 2009.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM R. BOOSE III, RESPONDENT.

759 N.W.2d 110

Filed January 16, 2009. No. S-07-923.

1. **Disciplinary Proceedings.** The issues in a disciplinary proceeding against a lawyer are whether the Nebraska Supreme Court should impose discipline and, if so, the type of discipline appropriate under the circumstances.
2. **Disciplinary Proceedings: States: Proof.** In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction; however, the Nebraska Supreme Court is entitled to independently assess the facts and independently determine the appropriate disciplinary action against the attorney in this state.
3. **Disciplinary Proceedings.** When determining the proper discipline of an attorney, the Nebraska Supreme Court considers an attorney's acts both underlying the offense and throughout the disciplinary proceeding.
4. **Rules of the Supreme Court: Attorneys at Law: Convictions.** An attorney who has been convicted of a felony has breached his or her oath of office as an attorney and the Nebraska Rules of Professional Conduct.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

Kevin P. Tynan, of Richardson & Tynan, P.L.C., and Richard L. Halbert, of Halbert, Dunn & Halbert, L.L.C., for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

SUMMARY

In this reciprocal attorney discipline case, Counsel for Discipline, the relator, asks us to discipline William R. Boose III, a member of the Nebraska State Bar Association. In July 2007, Boose pleaded guilty to violating 18 U.S.C. § 4 (2006) in the U.S. District Court for the Southern District of Florida. His crime was a federal felony offense. Because of his felony conviction, the Florida Supreme Court suspended him from the practice of law for 3 years. Boose notified the Nebraska Counsel for Discipline of his conviction, and the relator now seeks reciprocal discipline against Boose under Neb. Ct. R. § 3-321.

CRIMINAL ACTS LEADING TO SUSPENSION

Boose was admitted to the practice of law in Florida on November 10, 1969, and in Nebraska on July 27, 1970. Boose has maintained his membership in the Nebraska State Bar Association. His practice in Florida focuses on land use and zoning laws.

Boose's guilty plea provides the following facts regarding his conviction: Boose was an attorney who specialized in land use and zoning laws. He regularly appeared before the Palm Beach County Board of County Commissioners in Florida, seeking approval of land use, zoning, and other real-estate-related matters for his clients.

At the heart of the criminal prosecution was the sale of 3,500 acres of undeveloped land in Martin County, Florida, known as Nine Gems. In August 2002, Anthony Masilotti, a member of the Palm Beach County Board of County Commissioners, retained Boose to purchase a 150-acre tract of Nine Gems. To facilitate the purchase, Boose created a Florida land trust, naming a Boose law firm employee to act as trustee. Masilotti's then-wife was the sole beneficiary of the trust.

After he purchased the land, Masilotti used his position as a public official to pursue the purchase of the entire Nine Gems land by the South Florida Water Management District. He did not disclose that he had a financial interest in the land. The district ultimately purchased Nine Gems in October

2004, including the land owned by Masilotti. The district paid Masilotti $1.7 million by wire transfer for the sale of his holdings within Nine Gems.

In March 2004, before the closing on the sale, Boose became aware that Masilotti misused his public position to advance and leverage the sale of Nine Gems. But Boose did not make Masilotti's self-dealing known to the authorities. The government later charged Boose with having knowledge of the actual commission of a felony and failing to report it, in violation of 18 U.S.C. § 4. Boose pleaded guilty and admitted that he knew or should have known that Masilotti had engaged in wire fraud and that he failed to report it to the appropriate criminal authorities. On January 25, 2008, the court sentenced Boose to serve 24 months' imprisonment, fined him $25,000, and placed him on 1 year of supervised release. Boose also paid more than $400,000 in restitution.

Order of Suspension by the Florida Supreme Court

The Florida Bar Association brought disciplinary proceedings against Boose. A referee found that Boose violated two rules: (1) committing an act that is unlawful or contrary to honesty and justice and (2) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer. In Florida, disbarment is the presumptive sanction for a lawyer convicted of a felony; however, the referee made specific findings regarding mitigation. The referee found that Boose had not been previously disciplined; he had sought interim rehabilitation and shown remorse; other penalties or sanctions, specifically the criminal sentence, had been imposed; and the record reflected abundant evidence of Boose's good character and reputation. The referee noted that the character references submitted on Boose's behalf showed that he is a valued member of the Florida bar and his community.

The Florida Supreme Court approved the referee's report and suspended Boose from the practice of law for 3 years, effective August 3, 2007.[1] Because Boose is a member of the

[1] *The Florida Bar v. Boose*, No. SC07-1406, 2008 WL 2262400 (Fla. May 15, 2008) (unpublished disposition listed in table at 984 So. 2d 520).

Nebraska bar, the relator requests that reciprocal discipline be imposed in the State of Nebraska under § 3-321.

ANALYSIS

[1,2] The issues in a disciplinary proceeding against a lawyer are whether we should impose discipline and, if so, the type of discipline appropriate under the circumstances.[2] In a reciprocal discipline proceeding, "'a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction.'"[3] Although we are entitled to independently assess the facts,[4] we decline to do so when Boose has admitted his guilt in committing a serious felony offense. Because Boose has not alleged that he was deprived of due process of law in the Florida disciplinary proceedings, our review is limited to a determination of the appropriate sanction.[5]

[3] By pleading guilty to the federal criminal charges, Boose has admitted that he committed a criminal act that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of Neb. Ct. R. of Prof. Cond. § 3-508.4(b). The imposition of discipline is therefore appropriate. Under Neb. Ct. R. § 3-304, we may consider and impose the following public sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period; (3) probation instead of or after suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.[6] When another jurisdiction has disciplined an attorney, we may enter an order imposing the identical discipline, or greater or lesser discipline, as we deem appropriate.[7] When determining the proper discipline of an attorney, we consider an attorney's

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[2] See *State ex rel. Counsel for Dis. v. Finney*, 276 Neb. 914, 758 N.W.2d 622 (2008).

[3] See *State ex rel. Counsel for Discipline v. Rogers*, 272 Neb. 450, 451, 722 N.W.2d 505, 506 (2006).

[4] *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

[5] See *State ex rel. NSBA v. Van*, 251 Neb. 196, 556 N.W.2d 39 (1996).

[6] See *Finney*, *supra* note 2.

[7] § 3-321.

acts both underlying the offense and throughout the disciplinary proceeding.[8]

Boose was convicted of a felony for failing to report his client's felonious activity. As an attorney, Boose has an obligation to uphold the laws of the United States. His failure to do so is a grievous breach of professional ethics. It violates basic notions of honesty and endangers public confidence in the legal profession.

[4] Boose has violated his oath of office as an attorney and § 3-508.4(b). The motion for reciprocal discipline is granted. Boose is disbarred from the practice of law in the State of Nebraska, effective immediately. He shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Furthermore, Boose is directed to pay costs and expenses under Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

[8] See *Finney, supra* note 2.

REGENCY HOMES ASSOCIATION, A NEBRASKA NOT-FOR-PROFIT CORPORATION, APPELLEE, V. JEFFREY L. SCHRIER, APPELLANT.

759 N.W.2d 484

Filed January 23, 2009. No. S-07-903.

1. **Restrictive Covenants: Equity.** A homeowner's action to determine the enforceability of a subdivision's restrictive covenants is equitable in nature.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Associations: Contracts.** The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association.

4. **Contracts.** If the language of an organization's agreement is unambiguous, it shall be enforced according to its plain language.
5. ____. An agreement is ambiguous if it is susceptible to two or more reasonable but conflicting interpretations or meanings.
6. ____. The fact that the parties have suggested opposite meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. **Associations.** General powers of an architectural control committee must be exercised in a fair and reasonable manner.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, THOMAS A. OTEPKA, Judge. Judgment of Court of Appeals affirmed.

Robert W. Mullin and Andrew G. Davis, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Bruce H. Brodkey and Jason C. Demman, of Brodkey, Cuddigan, Peebles & Belmont, L.L.P., and Steven G. Olson II, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Regency Homes Association (Association) sued Jeffrey L. Schrier after he replaced his roof in violation of a covenant prohibiting asphalt shingles. The covenant had been passed as an amendment 2 years before the roof replacement. The original covenants did not specify roofing materials, but subjected all alterations to approval by the Association's architectural control committee (Committee). The question in this case is whether a vote to pass the amendment by three-quarters of those voting, but only a minority of the total homeowners, was valid under bylaws stating covenants could be "extended, modified, or terminated . . . by a three-quarters vote of the entire number of memberships of Regular Members present in person or by proxy." Also in issue is whether the roof covenant was invalid because it was outside the scope of what a homeowner

could reasonably expect from an "extension, modification, or termination" of the original covenants.

BACKGROUND

In 1968, the Association adopted its original bylaws and filed a declaration setting forth covenants and easements for the properties governed by the Association. The Association's bylaws separated members into two classes, "regular" members and "special" members. Individuals had one "regular" membership vote for each lot or dwelling unit owned in the area, but could only have one "special" membership vote, regardless of the number of properties owned. A "quorum" was defined in the bylaws as "[s]uch members present in person or by proxy . . . for any meeting of the Regular Members or for any meeting of any one or both membership classes."

The covenants were to run through December 31, 1998, and included the requirement that the dwellings be detached single-family homes not more than 2½ stories high, that they have enclosed garages with automatic doors, and that they follow specific driveway requirements and limitations on the location of recreational equipment. In addition, the covenants prohibited exterior trash burners, undesirable vegetation, visible rubbish, livestock, and specified activities on the lots. The covenants did not set forth any other specific building requirements, but stated:

> c. No single-family residence will be altered, built, constructed, or otherwise maintained on any lot without an express written Approval executed by Association through [the] Committee or [the Association's] permission by implied approval secured in the manner set out in its Articles of Incorporation or its By-Laws, as from time to time amended, as to general appearance, exterior color or colors, harmony of external design and location in relation to surroundings and topography and other relevant architectural factors.

The bylaws established the Committee and charged it with considering "preliminary plans, sketches, or specification or other provisional data for all buildings . . . or modifications thereof." The bylaws further described that within 30 days of

receipt of final plans and specifications, the Committee shall approve or disapprove the plans "as to harmony of external design and location in relation to surroundings, topography, and other relevant architectural factors of concern to the corporation."

The declaration stated that the "Association will have the right in the manner set out in its Articles of Incorporation or its By-Laws, as from time to time amended, at any time or from time to time to extend, modify, or terminate all or any part or parts of this Declaration." The bylaws provided:

> [A]ll or any part [of the declaration] shall be extended, modified, or terminated only when no one person holds more than one-fourth of the entire number of memberships of Regular Members and upon recommendation of the Board of Directors accepted by a three-quarters vote of the entire number of memberships of Regular Members present in person or by proxy at any annual or special meeting or responsive to a vote thereon by mail.

In 1988, the Association extended the declaration through December 31, 2028. No other relevant amendments were made at that time. In 2002, at the annual meeting, the members voted on changes to the declarations and bylaws, after being notified of the specific changes proposed. Out of 481 members in the Association, only 137 participated in the vote, and the amendments were considered passed after 119 voted in favor and 18 voted against. During the time of both amendments, no one person held more than one-quarter of the entire number of memberships of regular members, and both amendments were made upon recommendation of the board of directors.

The amendments set forth more detailed building specifications, including the added requirement that all roofs be covered with wood shakes or wood shingles, tile, or slate. Asphalt and woodruff products were specifically prohibited. Improvements made prior to the adoption of the amended declarations were generally not required to conform to the amended provisions, "until such time as any replacement or repair or substantial construction is made." And as to roofs specifically, "[h]omes with non-conforming roofing material as of the effective

date of these covenants must use conforming materials when replacement of said roof or repair of more than twenty-five percent (25%) of the roof surface occurs, unless approved by the Committee."

In 2004, Schrier's parents purchased a home in the subdivision governed by the Association. The purchase was made with the expectation of selling it shortly thereafter to Schrier. Schrier contracted to have the roof replaced with asphalt shingles, and in 2005, he purchased the property. Schrier did not obtain permission from the Committee for the replacement. The Association eventually notified Schrier that the new roof materials were in violation of the covenants and demanded they be replaced with approved materials. When Schrier refused, the Association brought action for injunctive relief restraining Schrier from maintaining the roof and for an order mandating removal of the nonconforming materials. Schrier moved for summary judgment, and the Association moved for partial summary judgment. The trial court entered partial summary judgment in favor of the Association, and after Schrier removed his only remaining defense of estoppel, the court entered a final judgment against him.

In a memorandum opinion, the Nebraska Court of Appeals affirmed.[1] The Court of Appeals reasoned that the bylaws were clear that an amendment could be made simply by three-quarters of those members participating in the vote—as opposed to three-quarters of all members in the Association. The Court of Appeals also concluded that the roof requirement merely defined alterations to the property with more specificity than the original declarations and was not an attempt to enact restrictions of which Schrier would have had no notice. We granted further review.

ASSIGNMENTS OF ERROR

Schrier asserts that the Court of Appeals erred in determining (1) that a minority of members of a homeowners' association can modify, extend, or terminate declared restrictive covenants;

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[1] *Regency Homes Assn. v. Schrier*, No. A-07-903, 2008 WL 4960468 (Neb. App. July 7, 2008) (selected for posting to court Web site).

(2) that an amended restrictive covenant that limits roof construction to wood shingles and that prohibits asphalt products is not a new covenant where the parties have stipulated that the prior original declarations did not limit or restrict roof construction or materials; and (3) that the proper interpretation of the bylaws of the Association is that the declaration containing restrictive covenants can be modified, extended, or terminated by a minority of the lot owners.

STANDARD OF REVIEW

[1,2] A homeowner's action to determine the enforceability of a subdivision's restrictive covenants is equitable in nature.[2] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

ANALYSIS

It is undisputed that Schrier's actions in replacing his roof with asphalt shingles were in clear violation of the plain language of the previously adopted roof covenant amendment. Schrier contends, however, that this amendment is invalid and unenforceable. We agree with the Court of Appeals that the amendment was validly passed and does not violate law or public policy.

We first address whether the vote for the amendment complied with the bylaws. The parties dispute the meaning of "three-quarters vote of the entire number of memberships of Regular Members present in person or by proxy at any annual or special meeting or responsive to a vote thereon by mail." According to Schrier, this language is ambiguous and cannot,

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[2] See, *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994); *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985); *1733 Estates Assn. v. Randolph*, 1 Neb. App. 1, 485 N.W.2d 339 (1992).

[3] *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003).

as a matter of law, be construed to mean that a minority of homeowners can amend the covenants. We disagree.

[3-6] The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association.[4] If the language of the organization's agreement is unambiguous, it shall be enforced according to its plain language.[5] The agreement is ambiguous if it is susceptible to two or more reasonable but conflicting interpretations or meanings.[6] The fact that the parties have suggested opposite meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[7]

In this case, while the provision refers to the "entire number of memberships," that phrase is clearly modified by "present in person or by proxy." Thus, the bylaws unambiguously allow amendment to the declaration by three-quarters of those voting, regardless of how many total homeowners choose to participate in the vote. Contrary to Schrier's assertion, we do not find that the use of the word "entire" adds any ambiguity to the overall meaning of the provision.

Nor do we find, as Schrier suggests, that homeowners cannot, as a matter of law, agree to a bylaw that could result in a minority of the homeowners' passing an amendment to the covenants. The Association is a nonprofit corporation governed by the Nebraska Nonprofit Corporation Act (the Act).[8] Section 21-1925(b) of the Act emphasizes that the corporation's bylaws "may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or

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[4] *Straub v. American Bowling Congress*, 218 Neb. 241, 353 N.W.2d 11 (1984). See, also, *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 264 N.W.2d 871 (1978).

[5] See, e.g., *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996); *Babcock v. Saint Francis Med. Ctr.*, 4 Neb. App. 362, 543 N.W.2d 749 (1996). See, also, e.g., *Turner v. Hi-Country Homeowners Ass'n*, 910 P.2d 1223 (Utah 1996).

[6] See *Boyles v. Hausmann*, *supra* note 2.

[7] *Id.*

[8] Neb. Rev. Stat. §§ 21-1901 to 21-19,177 (Reissue 2007).

the articles of incorporation." Nothing in the Act prohibits the bylaw provision in question in this case.

The Act provides that "[u]nless the . . . Act, the articles, or the bylaws require a greater vote or voting by class, if a quorum is present, the affirmative vote *of the votes represented and voting* (which affirmative votes also constitute a majority of the required quorum) is the act of the members."[9] Unlike amendment of articles of incorporation[10] or bylaws,[11] under the Act, amendments to covenants or declarations do not require a greater vote. Section 21-1961(a) states: "*Unless the . . . Act, the articles, or* [*the*] *bylaws provide for a higher or lower quorum*, ten percent of the votes entitled to be cast on a matter must be represented . . . to constitute a quorum . . . ." (Emphasis supplied.) There is nothing in the Act that requires a minimum quorum for amendments to covenants or declarations.

Schrier's reliance on secondary sources such as the Restatement (Third) of Property[12] and American Jurisprudence[13] is misplaced. Those sources set forth default rules for homeowner agreements that either fail to provide for amendments or do so ambiguously. Thus the Restatement explains, "*Unless the declaration specifies a different number*, an amendment adopted by members holding two-thirds of the voting power is effective . . . ."[14] While Schrier points out that the amendment provision in issue here is found in the bylaws and not the declaration, this is of no consequence. The comments to the Restatement indicate that the section upon which Schrier relies is designed to provide guidelines where no amendment powers are specified or for "interpretation" of expressly granted amendment powers.[15] As we have already explained, no such interpretation is necessary here.

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[9] § 21-1962(a) (emphasis supplied).

[10] § 21-19,107.

[11] § 21-19,114.

[12] Restatement (Third) of Property: Servitudes § 6.10 (2000).

[13] 20 Am. Jur. 2d *Covenants, Etc.* §§ 225 and 226 (2005).

[14] Restatement, *supra* note 12, § 6.10(b) at 195 (emphasis supplied).

[15] *Id.*, comment *a*. at 196.

In fact, Schrier's characterization of the Association bylaws as allowing "a minority"[16] to extend, modify, or terminate restrictive covenants is not accurate. Under the bylaws, as well as the Act,[17] all homeowners must be adequately notified of any proposed amendment and the manner in which the amendment would be voted on. If those homeowners all chose to participate in the vote, then no amendment could be passed by a minority. But when enough homeowners choose, after proper notification, not to participate in a vote on a proposed amendment, thereby leaving only a voting minority, it is hard to find any reason to invalidate a clearly written provision that would allow those participating to proceed with business.

We turn next to Schrier's argument that the roof amendment created a "new and different"[18] covenant that, under *Boyles*,[19] can only be passed unanimously. In *Boyles*, the original covenants involved the size of a residence and its garages, prohibited nuisances and temporary shelters, limited outbuildings and the type and number of animals, and required preapproval of construction plans. It also prohibited residential structures from being built "'on any building lot which is smaller in area than the original plotted number on which it is erected.'"[20] None of the provisions involved property setbacks. After an itemization of the covenant provisions, the covenants stated that "'[t]hese covenants . . . shall . . . continue . . . unless an instrument signed by a majority of the then owners . . . to change same in whole or in part'" shall have been recorded.[21] Later, a majority of the lot owners added a covenant prohibiting the building of residences or other buildings within 120 feet of a country road that ran through the subdivision. Because of the size and location of a particular lot, the setback provision made that lot

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[16] Brief for appellant at 13.

[17] § 21-1955.

[18] Brief for appellant at 22.

[19] *Boyles v. Hausmann, supra* note 2.

[20] *Id.* at 191, 517 N.W.2d at 617.

[21] *Id.* at 183, 517 N.W.2d at 613.

unsuitable for building, and the owners sued to invalidate the new covenant.

On appeal, we agreed that the new setback provision was invalid. We acknowledged the general rule that "courts shall enforce changes to original covenants when such changes are permitted by the covenant agreement."[22] But, we explained that "[i]f a restrictive covenant agreement also contains a provision which provides for future alteration, the language employed determines the extent of that provision."[23] We emphasized that "[a]lthough we will enforce those restrictions of which a landowner has notice, we will not hold that a property owner is bound to that of which he does not have notice."[24]

We concluded that the specific language and context of the "change these covenants" provision did not authorize a mere majority of lot owners to bind all of the lot owners to "new and different covenants which restricted the use of the land."[25] We explained that there was thus nothing in the covenants which would have put the plaintiffs on notice that their land would one day be subject to a setback limit resulting in an inability to build on their lot. We did not say that under all circumstances, "new and different" covenants are invalid.

In this case, the declaration set forth that the members could "extend, modify, or terminate all or any part or parts of this Declaration." Therefore, the question is whether the roof covenant can be considered an "extension" or "modification" of the original covenants such that a homeowner in the Association would be on notice that his or her home could one day be subject to the roof amendment. Schrier points out that the parties stipulated that the original covenants did not specify roofing materials. But we note that the original covenants did describe that the Committee would have control over the "general appearance, exterior color or colors, harmony of external

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[22] *Id.* at 190, 517 N.W.2d at 617.

[23] *Id.* at 189, 517 N.W.2d at 616.

[24] *Id.* at 191, 517 N.W.2d at 617.

[25] *Id.* at 192, 517 N.W.2d at 618.

design and location in relation to surroundings and topography and other relevant architectural factors."

[7] General powers of an architectural control committee must be exercised in a fair and reasonable manner,[26] and we do not determine specifically whether, as the Association contends, it could have prohibited Schrier from using asphalt shingles even under the old covenants. We do determine, however, that the original covenants' broad language contemplated control over general appearance, and general appearance would include roofing materials. A shake roof, for instance, has a different general appearance than an asphalt roof. Homeowners in the Association would have reasonably contemplated that an "extension" of the Committee covenant could later include a more specific description of roof materials acceptable for the homes in the subdivision. Accordingly, we hold that the amended roof covenant does not violate the principles set forth in *Boyles*.[27]

CONCLUSION

The roof amendment was passed in accordance with the Association's bylaws and original declaration, and we find no reason to invalidate that amendment. Since it is undisputed that Schrier violated the amended roof covenant, we affirm the judgment of the Court of Appeals, which affirmed the trial court's judgment in favor of the Association.

AFFIRMED.

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[26] See *Normandy Square Assn. v. Ells*, 213 Neb. 60, 327 N.W.2d 101 (1982).

[27] *Boyles v. Hausmann*, *supra* note 2.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. MARY C. WICKENKAMP, RESPONDENT.

759 N.W.2d 492

Filed January 23, 2009. No. S-07-1313.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
3. ____. Each attorney discipline case is evaluated individually in light of its particular facts and circumstances.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
5. ____. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
6. ____. The determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors.
7. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
8. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is a threat to the credibility of attorney disciplinary proceedings.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges consisting of three counts against respondent, Mary C. Wickenkamp. After service, Wickenkamp

did not respond to the formal charges. Relator moved for judgment on the pleadings. On May 7, 2008, this court entered judgment limited to the facts and reserved ruling on the appropriate sanction until after briefing and oral argument. After reviewing the matter, we find that the proper sanction is disbarment.

STATEMENT OF FACTS

Wickenkamp was admitted to the practice of law in Nebraska on September 22, 1980. She conducted a private practice in Lincoln, Nebraska. Wickenkamp received two prior private reprimands, on December 18, 2000, and October 30, 2003, and was previously the subject of reported discipline in 2007.

In *State ex rel. Counsel for Dis. v. Wickenkamp*, 272 Neb. 889, 725 N.W.2d 811 (2007) (*Wickenkamp I*), this court found by clear and convincing evidence that Wickenkamp had violated: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and DR 1-102(A)(5) (engaging in conduct prejudicial to administration of justice); Canon 6, DR 6-101(A)(3) (neglecting legal matter); and Canon 7, DR 7-101(A)(2) (failing to carry out contract of employment for professional services); as well as her oath of office, Neb. Rev. Stat. § 7-104 (Reissue 1997). This court suspended Wickenkamp's license to practice law for a 12-month period beginning on January 12, 2007. After the conclusion of her 12-month suspension on January 12, 2008, Wickenkamp did not seek reinstatement.

Formal charges were again filed against Wickenkamp on June 12, 2007. These charges give rise to the instant case. Because the conduct occurred before and after this court adopted the Nebraska Rules of Professional Conduct, certain allegations are brought under the now-superseded Code of Professional Responsibility and other allegations are brought under the rules. See *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008). Because relator was unable to obtain service of process on Wickenkamp within the required 6-month time period, the case was dismissed and relator refiled

the charges on December 13. On February 14, 2008, relator asked this court for permission to serve Wickenkamp by publication. In support of this request, relator attached to its affidavit a letter from Wickenkamp which stated that she had moved from Nebraska and does not intend to practice law in Nebraska in the future.

On February 20, 2008, this court sustained relator's motion to serve Wickenkamp by publication. Wickenkamp did not respond to the formal charges. On April 15, relator moved for a judgment on the pleadings. On May 7, this court granted judgment on the pleadings as to the facts alleged in the formal charges, but directed that the case proceed to briefing and oral argument on the issue of discipline.

The formal charges, which are uncontested and make up the record in this case, involve three separate incidents. First, in 2005, Wickenkamp represented Lloyd Trackwell, Jr. (Lloyd Jr.), and the Trackwell family in the sale of a parcel of real estate to B & J Partnership, Ltd. (B&J). The sale of land between B&J and the Trackwell family was to close on July 15, 2005. On July 12, B&J's in-house counsel contacted Wickenkamp and informed her that his client wanted to postpone the July 15 closing and possibly cancel the deal.

On July 13, 2005, Lloyd Jr. hand delivered a letter to a B&J principal threatening a breach of contract action if the closing did not take place on July 15. The letter further stated that any lawsuit would also contain a claim for antitrust violations that would have the potential to "'effectively eviscerate [B&J] and its holdings.'" B&J's in-house counsel e-mailed Wickenkamp stating that he had no problem with Wickenkamp's contacting a B&J principal with issues involving the contract negotiations, but that she was not to contact B&J principals directly regarding possible litigation. Wickenkamp was advised that any discussions about litigation should be directed to B&J's outside counsel. Wickenkamp replied that she would not communicate with B&J's outside counsel because she believed that he had a conflict of interest.

On July 14, 2005, Wickenkamp had a letter delivered to another B&J principal, A. Joyce Smith. The letter stated that the Trackwell family still intended to close on July 15 and went

on to state possible bases for a lawsuit if B&J failed to close as agreed. On July 15, the Trackwell family and Wickenkamp appeared for the closing but B&J did not. Wickenkamp prepared a letter stating that they were at the closing and that they had expected B&J to appear. Wickenkamp had Lloyd Jr. hand deliver the letter to Smith.

On July 18, 2005, on behalf of Judith Trackwell, Wickenkamp filed a complaint in the U.S. District Court for the District of Nebraska against B&J and its representatives alleging breach of contract, tortious interference with a business relationship, and violations of federal and state antitrust laws. That same day, Lloyd Jr. personally delivered the summons and copies of the complaint to B&J's office and signed and filed returns of service indicating that he had personally served the individual defendants. Also on that same day, Wickenkamp had Lloyd Jr. hand deliver a letter to Smith accusing Smith of attempting to avoid service and stating that Wickenkamp would continue to communicate directly with Smith, because Wickenkamp believed that B&J's outside counsel had a conflict of interest. A second letter from Wickenkamp to Smith was delivered later that day by Lloyd Jr. This letter stated that "'any conveyances of property, real or person (*sic*) from [B&J] to any other party in an attempt to protect the assets of [B&J] will be fully prosecuted under the Nebraska Fraudulent Conveyances statutes.'"

On July 19, 2005, Wickenkamp arranged for the delivery of two additional letters directly delivered to Smith. One letter was a settlement offer, and the other letter stated that Wickenkamp was serving B&J with a subpoena. In the second letter, Wickenkamp again stated that she would not communicate with B&J's outside counsel. Wickenkamp had another letter hand delivered to Smith on July 21. This letter warned that Wickenkamp would file an amended complaint in federal court raising additional claims against B&J unless B&J paid the balance of the contract price by the close of business on July 22. The July 21 letter also threatened to subpoena various B&J representatives for depositions in a state condemnation case then pending regarding a parcel of real estate adjacent to the real estate in dispute in the federal case. According to

the formal charges, the state case was referred to as "*City of Lincoln v. Trackwell*, CI-04-3289."

On July 26, 2005, Wickenkamp had the threatened subpoenas and a subpoena under what is now codified as Neb. Ct. R. Disc. § 6-330(b)(6) for corporate response served on the B&J principals and B&J's in-house counsel. As warned in the July 21 letter, the subpoenas were not issued out of the federal case, but, rather, were issued out of the separate state court condemnation case. The only issue before the court in the state case was the market value of the condemned parcel of land and the amount of any severance or consequential damages. The § 6-330(b)(6) subpoena sought discovery unrelated to the issues before the state court, including, inter alia, information relating to a disciplinary complaint filed by Wickenkamp against B&J's outside counsel, communications between B&J and a title company, development plans of B&J, communications between B&J and lending institutions, and communications with contractors regarding development of the property.

On July 28, 2005, Wickenkamp filed the first amended complaint in the federal court case, raising additional claims against B&J. On July 29, Wickenkamp filed a second amended complaint adding additional defendants to the federal lawsuit. On August 1, Wickenkamp sent B&J's in-house counsel another demand letter stating that unless B&J paid the Trackwells the contract price plus compensatory damages by noon on August 4, Wickenkamp would file a third amended complaint adding claims under the federal Racketeer Influenced and Corrupt Organizations Act. Apparently after receiving the August 1 letter, B&J and its principals retained a new law firm.

After Wickenkamp filed a third amended complaint, counsel for the defendants moved to disqualify Wickenkamp as counsel of record for the Trackwells, arguing that she would be a witness in the trial of the matter and for sanctions against Wickenkamp for her abusive and bad faith conduct in the prosecution of the Trackwells' claims and in related litigation. Prior to the court's ruling on the motion to disqualify, Wickenkamp withdrew as counsel. The federal magistrate judge ultimately found that Wickenkamp's behavior was abusive and

unnecessarily escalated a simple breach of contract case into a case alleging illegal if not criminal conduct by B&J and sanctioned Wickenkamp personally in the amount of $33,631. The federal district court judge affirmed the order.

Relator alleged that the acts of Wickenkamp in her representation of the Trackwells violated § 7-104, Wickenkamp's oath of office as an attorney licensed to practice law in the State of Nebraska, and the following provisions of the Nebraska Code of Professional Responsibility (for conduct that occurred prior to September 1, 2005): DR 1-102 (misconduct); Canon 5, DR 5-101 (refusing employment when interests of lawyer may impair lawyer's independent professional judgment) and DR 5-102 (withdrawal as counsel when lawyer becomes witness); and Canon 7, DR 7-102 (representing client within bounds of law); and DR 7-103 (communicating with one of adverse interest). Relator further alleged that the acts of Wickenkamp violated the following provisions of the Nebraska Rules of Professional Conduct (for conduct that occurred after September 1, 2005), as now codified: Neb. Ct. R. of Prof. Cond. § 3-503.2 (expediting litigation), § 3-503.7 (lawyer as witness), § 3-504.2 (communication with person represented by counsel), and § 3-508.4 (misconduct).

In count two of the formal charges, relator stated that in June 2005, Tiffany Lacy hired Wickenkamp to represent Lacy in recovering for injuries she incurred while working for a roofing contractor. Wickenkamp and Lacy never memorialized in writing the terms of the fee agreement, but there seems to be an agreement that Wickenkamp was to receive one-third of any recovery. It is not clear, however, as to what figure one-third would apply. Lacy had been injured in 2003, and by the time she retained Wickenkamp, there were issues regarding the statute of limitations on her claims. Wickenkamp eventually settled with Lacy's employer on the following terms: receipt of a cash payment of $5,000, the employer's agreement to pay for all future medical services required by Lacy as a result of the injury, and the employer's agreement to waive a construction lien that the employer had against Lacy's grandmother's house. Lacy claims that it was her understanding that Wickenkamp would receive one-third of the $5,000 cash payment. However,

Wickenkamp claimed a fee of one-third of $15,000, the estimated value of the medical services, plus an additional amount for other work Wickenkamp had performed for Lacy. The fee totaled $6,400; Wickenkamp reduced her fee to $4,000 and distributed the balance of the funds, $1,000, to Lacy. At the time Wickenkamp distributed the funds, she knew Lacy disagreed with the proposed fee.

Relator alleged that this act violated § 7-104, Wickenkamp's oath of office as an attorney licensed to practice law in the State of Nebraska, and violated the following provisions of the Code of Professional Responsibility (for conduct that occurred prior to September 1, 2005): DR 1-102 (misconduct) and Canon 9, DR 9-102 (preserving identity of funds and property of client). Further, relator alleged that Wickenkamp's conduct occurring after September 1, 2005, violated Neb. Ct. R. of Prof. Cond. § 3-501.15 (safekeeping property), as now codified.

Finally, count three of the formal charges alleged that sometime during 2003, Wickenkamp was retained by Scott Cash, or his mother, to assist him on various postconviction claims. In July 2004, Cash sought to have a rehearing before the Nebraska Court of Appeals. Under a deadline for filing the pleading seeking review, Wickenkamp signed Cash's name to a purported pro se filing and filed it with the court. Wickenkamp claims that Cash gave her permission to sign his name. Cash disputes this assertion. Nowhere in the pleading did Wickenkamp acknowledge that she was signing on behalf of Cash.

Relator alleged that this act constituted a violation of § 7-104, Wickenkamp's oath of office as an attorney licensed to practice law in the State of Nebraska, and violated the following provisions of the Code of Professional Responsibility: DR 1-102 (misconduct) and DR 7-102 (representing client within bounds of law).

ANALYSIS

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008). An attorney against whom formal charges have been filed is subject to a judgment on the

pleadings if he or she fails to answer those charges. *Id*. The disciplinary rules provide that if no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral argument is given before disbarment is ordered. *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

[2] We have stated that "[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances." *State ex rel. Counsel for Dis. v. Swanson*, 267 Neb. 540, 551, 675 N.W.2d 674, 682 (2004). In the instant case, on May 7, 2008, this court granted relator's motion for judgment on the pleadings as to the facts; therefore, the only issue before us is the type of discipline to be imposed.

Neb. Ct. R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
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> (2) Suspension by the Court; or
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> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
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> (4) Censure and reprimand by the Court; or
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> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, Neb. Ct. R. § 3-310(N).

[3,4] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances. See *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

[5,6] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this

court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Id*. We have also noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *State ex rel. Special Counsel for Dis. v. Fellman*, 267 Neb. 838, 678 N.W.2d 491 (2004). We have considered prior reprimands as aggravators. *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005).

Relator suggests that the appropriate sanction in this case is disbarment. In considering the appropriate sanction, we note that the evidence in the present case establishes among other facts that Wickenkamp: (1) improperly escalated a simple contract case into a case involving illegal and possibly criminal behavior, (2) contacted opposing parties who were represented by counsel, (3) distributed a portion of her client's funds to herself as fees when she knew her client disagreed with the proposed fee, and (4) forged her client's signature to a purported pro se filing. Further, we are aware of and must consider as aggravators Wickenkamp's two prior private reprimands and the suspension of her license for 1 year, based on separate formal charges involving Wickenkamp's neglect of client matters. See *Wickenkamp I*.

[7] In *Wickenkamp I*, we noted that this court was seriously concerned with Wickenkamp's repeated neglect of matters entrusted to her. We further noted that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. *Id*. Indeed, we have said that ordinarily, cumulative acts of misconduct can, and often do, lead to disbarment. *State ex rel. Counsel for Dis. v. Sutton*, 269 Neb. 640, 694 N.W.2d 647 (2005). The facts alleged in the formal charges, which stand as established in this case, demonstrate Wickenkamp's continued pattern of improperly handling the cases entrusted to her and support the imposition of relator's suggested discipline of disbarment.

[8] In our consideration of the appropriate discipline, we are also concerned by Wickenkamp's failure to respond to the formal charges filed by relator. We consider an attorney's failure to respond to inquiries and requests for information from relator as an important matter and as a threat to the credibility of attorney disciplinary proceedings. See *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000). The failure to respond to formal charges in this court is of even greater moment.

Upon due consideration of the facts of this case, based on Wickenkamp's cumulative acts of misconduct and her disrespect for this court's disciplinary jurisdiction, the court finds that the proper sanction is disbarment.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that Wickenkamp should be and is hereby disbarred from the practice of law, effective immediately. Wickenkamp is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

WRIGHT, J., participating on briefs.

FORT CALHOUN BAPTIST CHURCH, APPELLANT, v. WASHINGTON COUNTY BOARD OF EQUALIZATION, APPELLEE.

759 N.W.2d 475

Filed January 23, 2009. No. S-08-108.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Taxation: Property: Statutes: Proof.** Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is upon the claimant.
5. **Taxation: Property: Words and Phrases.** The term "exclusively" means that the primary or dominant use of a property, and not an incidental use, is controlling in determining whether the property is exempt from taxation.
6. **Property: Nonprofit Organizations.** Property is not used for financial gain or profit to either the owner or user if no part of the income from the property is distributed to the owners, users, members, directors, or officers, or to private individuals.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded with directions.

Milo Alexander and Kevin O'Connell, Senior Certified Law Student, of Abrahams Legal Clinic, Creighton University School of Law, and, on brief, Steven M. Virgil for appellant.

Edmond E. Talbot III, of Talbot & Truhlsen Law Offices, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Fort Calhoun Baptist Church (Church) leased part of its facilities to the Fort Calhoun Community School District (School). As a result of the lease, the Washington County Board of Equalization (Board) reduced the tax exemption on the Church's property from 100 percent to 80 percent. The Tax Equalization and Review Commission (TERC) affirmed the Board's action, and the Church appeals.

SCOPE OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2006). See *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). When reviewing a judgment for errors appearing on the record, an appellate court's

inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *St. Monica's v. Lancaster Cty. Bd. of Equal.*, 275 Neb. 999, 751 N.W.2d 604 (2008). Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *City of York, supra*.

FACTS

The Church is a religious organization that meets the requirements to hold property exempt from property taxes. The Church owns real property in Fort Calhoun, Nebraska.

In February 2006, the School, also a tax-exempt organization, began looking for a space to use for a new special education program. At that time, the School's special education students were receiving services in Omaha, Nebraska, and the School sought to provide these services in Fort Calhoun. The School's goals were to meet the educational needs of the students and to save costs associated with contract services and transporting the children to Omaha.

The School researched market rental rates in Fort Calhoun and Blair, Nebraska. The investigation of potential sites revealed there were few suitable facilities in Fort Calhoun. The School identified two potential sites: the Church and St. John's Catholic Church. The School contacted both churches about leasing classroom space. One reason the School was interested in the Church was its proximity to the Fort Calhoun high school. St. John's Catholic Church ultimately determined its facility would not be available for school use.

The Church was reluctant to enter into a lease, and it proposed that the School make a charitable donation to the Church to offset the increase in costs associated with the School's presence. Because the School required a contract, the Church asked the School to make an offer. The Church provided the School with financial statements from the past 3 years to assist the School in setting an amount. In negotiating a contract and monthly rent, the Church's objectives were to ensure the Church did not incur a financial loss as a result of the lease and to demonstrate to the community that it was not "overly benefiting" from the contract with the School.

The Church and the School entered into a facilities use agreement on July 31, 2006, for $1,325 per month including utilities, for 10 months each year for the 2006-07 and 2007-08 school years. After 2 years, the contract was to automatically renew for another school year unless otherwise agreed.

Included in the $1,325 rent were prorated physical upgrade costs. Approximately $5,000 to $7,000 in modifications for handicapped access and fire safety was necessary for the space to meet the fire marshal's requirements. The Church agreed to complete the upgrades, bear the upfront cost of the materials, and donate the pastor's carpentry skills and labor, charging the School a total of $6,000 to be paid in 20 monthly installments of $300. The parties anticipated that the physical modifications to the Church would remain in place after the termination of the lease and that these physical modifications would also benefit the Church.

The Church applied for a 100-percent tax exemption on its real property on November 20, 2006. The Washington County assessor subsequently recommended an 80-percent exemption. The Board concurred with the assessor's recommendation and notified the Church of the valuation change designating 20 percent of the property as taxable. The Church timely protested the valuation, and TERC scheduled a hearing.

At the hearing, the Church presented evidence of rental values for property in Fort Calhoun. It excluded properties that did not include utilities and a warehouse property as not comparable. The properties varied in size, and most were less than 1,000 square feet. The Church identified four comparable properties, added the monthly rents together, divided that number by the total square footage, and multiplied by 71 percent to account for the fact that the School used the property only 5 out of 7 days each week. It calculated a market value of 54.9 cents per square foot.

A representative for the Church stated that in Fort Calhoun, there was a premium on rent for properties over "a certain size." The Church determined that the School rented 2,243 square feet. Using $1,025 as the figure for rent, the Church calculated the rental rate at 45.7 cents per square foot, which it claimed was 9.2 cents below market value.

In its opinion, TERC assigned $1,325 as the rental amount for 3,200 square feet. It calculated the amount of time the School used the property and concluded the actual rental rate was 57.8 cents per square foot. TERC determined market rental values by identifying two properties and calculating the rental price per square foot. One property rented for 45 cents per square foot ($360 ÷ 800 square feet), and the other rented for 66.7 cents per square foot ($1,600 ÷ 2,400 square feet). The 800-square-foot property with a rental value of 45 cents per square foot per month did not include utilities.

TERC found that the evidence did not support a finding that the Church had leased the property to the School at a below-market rate. As such, it determined that the Church had not met its burden of proving its eligibility for an exemption, because it "failed to demonstrate that the lease of the subject property to the School was for less than market value or that its lease of the subject property to the School represents a contribution of any manner in aid of a charitable, religious or educational use by the School." It concluded the Church had not proved by clear and convincing evidence that the Board's decision was unreasonable or arbitrary, and it affirmed the Board's recommendation of an 80-percent exemption. The Church appeals.

ASSIGNMENTS OF ERROR

The Church claims that TERC erred by not considering the School's educational use of the property in determining whether the property was used for an exempt purpose and that TERC incorrectly determined the lease was for a business purpose.

ANALYSIS

The issue is whether the property leased by the Church to the School was used exclusively for educational, religious, or charitable purposes and, therefore, was exempt from taxation pursuant to Neb. Rev. Stat. § 77-202 (Cum. Supp. 2006).

[4] Neb. Const. art. VIII, § 2, states in pertinent part: "[T]he Legislature by general law may classify and exempt from taxation property owned by and used exclusively for . . . educational, religious, charitable, or cemetery purposes, when such

property is not owned or used for financial gain or profit to either the owner or user." Section 77-202 provides:

> (1) The following property shall be exempt from property taxes:
>
> . . . .
>
> (d) Property owned by educational, religious, charitable, or cemetery organizations, or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. For purposes of this subdivision, educational organization means (A) an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or assisting students through services relating to the origination, processing, or guarantying of federally reinsured student loans for higher education.

Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is upon the claimant. *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983).

TERC relied upon *United Way* in affirming the Board's decision. TERC examined whether the lease to the School was a qualified charitable use by the Church. It found that the leased property was used by the Church for religious purposes on weekends, Wednesday evenings, and other times when necessary. TERC found there was no evidence that the School used the property for religious purposes or that the Church made any educational use of the leased premises except in conjunction with its religious use. Because this property was used a significant amount of time by the School for educational purposes, TERC concluded that the Church did not use the property exclusively for a religious use.

Next, TERC examined the amount of rent charged by the Church to determine whether the lease evidenced a charitable use. It considered whether the lease was below the market rate, because the court in *United Way* had concluded that the lease by United Way of the Midlands (United Way) at less than fair market value was a charitable use. TERC examined comparable leases submitted by the School and concluded that the lease to the School was not at a below-market rate. Because the lease was not below the market rate, TERC found that the lease did not represent a contribution in aid of a charitable, religious, or educational use by the School. Therefore, it concluded that the leased portion of the property was not exempt. TERC affirmed the Board's reduction of the Church's exemption to 80 percent.

For the reasons set forth below, we reverse the judgment and remand the cause with directions to grant the Church a 100-percent exemption. Because TERC relied upon our decision in *United Way*, we examine that opinion in more detail.

United Way was a charitable nonprofit organization that owned real property that was approximately 27,704 square feet. It occupied over half the property and was required to lease the remaining square footage to charitable or nonprofit agencies. The issue was whether the remaining square footage was tax exempt.

United Way leased 5,256 square feet to two other charitable nonprofit organizations, Omaha Council of Campfire Girls (Campfire Girls) and Greater Omaha Community Action (Community Action), for about one-half the fair market rental value of similarly contracted and situated properties. The board of equalization determined that the leased property and the vacant space were subject to taxation. In contrast, the district court held that all the property was exempt from taxation.

In affirming the district court's decision, this court focused upon the market value of the lease in determining whether the leased premises were exempt. This reasoning has created some confusion as to the relevance of the market value or the amount charged for the lease. The court in *United Way* reasoned that because the lease from United Way to Campfire

Girls and Community Action was less than the fair market value, United Way's use of the leased property remained charitable as opposed to a business purpose and was therefore still exempt.

It was not disputed that Campfire Girls' and Community Action's use of the leased space was charitable. This fact should have ended the court's inquiry. Instead, the court examined whether the lease by United Way at less than fair market value was a continued charitable use of the property by United Way.

When the court implicitly rejected the position that ownership and operation of the subject property must coincide in a single legal entity in order for the property to qualify for a charitable exemption, the court should have focused on the use of the property by the lessees. The issue in *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983), was not whether the lease for less than fair market value was a charitable use by United Way. It was the charitable use of the property by Campfire Girls and Community Action that established the use of the property as being tax exempt.

[5] Although ownership and use of the property may be by different entities, exclusive use of the property for exempt purposes is required. See *United Way, supra*. It is the exclusive use of the property that must be determined. The term "exclusively" means that the primary or dominant use of the property, and not an incidental use, is controlling in determining whether the property is exempt from taxation. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

[6] In the case at bar, it is the exclusive use of the property that governs the exemption, and not the market value of the lease. It was not disputed that the Church and the School were organizations qualified to own property exempt from taxation. The issue of financial gain or profit to the owner or user of the subject property was not an issue to be considered by TERC. Property is not used for financial gain or profit to either the owner or user if no part of the income from the property is distributed to the owners, users, members, directors, or officers, or to private individuals. See *United Way, supra*.

It was undisputed that the property was not used for the sale of alcohol and that neither the Church nor the School discriminated on the basis of race, color, or national origin. Thus, the only issue remaining was whether the Church property was used exclusively for an exempt purpose.

It is the exclusive use of the property that determines the exempt status. See *Nebraska Conf. Assn. Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965). The Constitution and the statutes do not require that the ownership and use must be by the same entity. Ownership and use may be by separate entities. *United Way, supra*.

For property to be exempt from taxation, a claimant must prove

> "(1) that the subject property is owned by a charitable, educational, religious, or cemetery organization; (2) that the subject property is not being used for financial gain or profit to the owner or user; and (3) that the subject property is being used exclusively for charitable, educational, religious, or cemetery purposes[.]"
>
> [Additionally,] the property cannot be used for the sale of alcoholic liquors for more than 20 hours per week and the property cannot be owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.

Bethesda Found. v. Buffalo Cty. Bd. of Equal., 263 Neb. 454, 458, 640 N.W.2d 398, 402 (2002), quoting *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988).

In *Bethesda Found., supra*, we referred to a Department of Property Assessment and Taxation regulation dealing with the uses of property. We noted that an exemption was available only if property was

> "used exclusively for religious, educational, charitable, or cemetery purposes. The property need not be used solely for one of the four categories of exempt use, but may be used for a combination of the exempt uses. For purposes of this exemption, the term exclusive use shall mean the predominant or primary use of the property as opposed to

> incidental use. . . .” See 350 Neb. Admin. Code, ch. 40, § 005.03 (1999).

Bethesda Found., 263 Neb. at 459, 640 N.W.2d at 403. The use of the property establishes whether it is exempt. *Id.*

In this case, the property was being used exclusively for religious or educational purposes. We conclude that the property owned by the Church was used exclusively for religious and/or educational purposes. The School used the fellowship hall, restrooms, and areas for ingress and egress Monday through Friday during school hours, unless the use would interfere with a wedding, funeral, or election. This use was educational and was an exempt use. The remainder of the time, the Church used the property for religious purposes, which was also an exempt use.

The lease of the property by the Church to the School did not create a taxable use. Both of the uses were exempt. The property was used for a combination of exempt uses. TERC was misled by our reasoning in *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983), when the court considered the market value of the lease to Campfire Girls and Community Action. To the extent that *United Way* focused on the market value of the lease and not the subsequent use of the property by the lessees, such reasoning is disapproved.

The Legislature, by general law, may classify and exempt from taxation property owned by and used exclusively for educational, religious, or charitable purposes when such property is not owned or used for financial gain or profit to either the owner or user. See Neb. Const. art. VIII, § 2. The Legislature has provided that property owned by educational, religious, or charitable organizations for the exclusive benefit of educational, religious, or charitable organizations and used exclusively for educational, religious, or charitable purposes shall be exempt from property taxes. See § 77-202(1)(d).

The lease by the Church to the School did not create a nonexempt use of the property. The property continued to be used exclusively for religious and educational purposes.

CONCLUSION

Appellate courts review decisions rendered by TERC for errors appearing on the record. § 77-5019(5). See *City of York v. York Cty. Bd. of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *St. Monica's v. Lancaster Cty. Bd. of Equal.*, 275 Neb. 999, 751 N.W.2d 604 (2008). We conclude that TERC's decision did not conform to the law. The property was used exclusively for tax-exempt purposes within the meaning of § 77-202. The primary or dominant use of the property was for religious and educational purposes. There was no evidence to the contrary.

Therefore, TERC's order is reversed and the cause is remanded to TERC with directions to instruct the Board to grant a 100-percent exemption on the Church's property.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., concurring.

Given the facts of the case, I concur in the result reached by the majority. I would not, however, disregard the potential relevance of the market value or profitability of a lease in all cases, and I see no need to disapprove *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337 N.W.2d 103 (1983), in this regard in this case. I agree that an analysis of "use" by both the claimant-owner and renter is a suitable inquiry relative to the exempt analysis in property tax cases. However, the burden of proving the right to exemption is upon the claimant-owner, *id.*, and, as discussed below, the claimant-owner must show that its use continues to be the use or purpose for which the exemption was granted. I write separately only to express my view that an unnaturally high rent may have implications for exempt purposes, because at some point, the use of the property as a device for generating exaggerated receipts will have bearing on whether the dominant use of the claimant-owner remains for the charitable purpose of the original exemption or will have devolved into an unrelated use.

It has been observed elsewhere that the generation of excess revenues, even from exempt activities, can jeopardize an organization's property tax exemption, but will not result in loss of exempt status so long as, upon analysis, those revenues are reinvested into the expansion and maintenance of the organization. See *St. Margaret Seneca Place v. Board*, 536 Pa. 478, 640 A.2d 380 (1994). See, also, *West Allegheny Hosp. v. Bd. of Prop. Assess.*, 500 Pa. 236, 455 A.2d 1170 (1982); David A. Brennen, *The Commerciality Doctrine as Applied to the Charitable Tax Exemption for Homes for the Aged: State and Local Perspectives*, 76 Fordham L. Rev. 833 (2007); Andras Kosaras, *Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums Be Tax Exempt?*, 35 New Eng. L. Rev. 115 (Fall 2000). While not a perfect analogy, this analysis is similar to the examination employed with respect to the unrelated business income tax, I.R.C. §§ 511 through 515 (2000), wherein income tax may be imposed on an exempt organization's unrelated trade or business income, following a determination as to whether the unrelated activity serves the organization's primary exempt purpose or, to the contrary, is the operation of an unrelated business.

An inquiry regarding the leased portion in a case such as the present one should permit examination into various aspects of the lease and the relationship of the use of the portion in question to the claimant-owner's purpose. See *Home of Carlisle v. Bd. of Assessment*, 591 Pa. 436, 919 A.2d 206 (2007). I would not conclude that the mere fact that both the claimant-owner and renter are exempt organizations ends the inquiry. On the facts of this case, given the modest rent charged, the portion in question is obviously not used as an unrelated business vehicle serving as a revenue stream to finance an endeavor different from that for which the property tax exemption was granted. I, therefore, agree with the majority that the claimant-owner was entitled to its property tax exemption without a reduction.

STATE OF NEBRASKA, APPELLEE, V. APRIL ROGERS, APPELLANT.

760 N.W.2d 35

Filed January 30, 2009. No. S-07-085.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law which an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Self-Incrimination.** The Fifth Amendment gives one the right to remain silent unless that person chooses to speak in the unfettered exercise of his or her own will.
3. ____: ____. If a suspect indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, the interrogation must cease.
4. ____: ____. The mere fact that a suspect may have answered some questions or volunteered some statements on his or her own does not deprive him or her of the right to refrain from answering any further inquiries until he or she has consulted with an attorney and thereafter consents to be questioned.
5. **Miranda Rights: Police Officers and Sheriffs: Self-Incrimination.** A suspect must articulate his or her desire to cut off questioning with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent.
6. ____: ____: ____. The rights provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny, including the right that the police scrupulously honor one's invocation of the right to remain silent, are only applicable in the context of a custodial interrogation.
7. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** "Interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.
8. **Arrests: Words and Phrases.** Being "in custody" does not require an arrest, but refers to situations where a reasonable person in the defendant's situation would not have felt free to leave—and thus would feel the restraint on freedom of movement of the degree associated with a formal arrest.
9. **Miranda Rights.** The relevant inquiry in determining "custody" for purposes of *Miranda* rights is whether, given the objective circumstances of the interrogation,

a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.

10. ____. Two inquiries are essential to the determination of whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether, given those circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.
11. **Self-Incrimination.** A suspect has the right to control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.
12. **Criminal Law: Self-Incrimination: Appeal and Error.** In considering whether a suspect has clearly invoked the right to remain silent, an appellate court reviews not only the words of the criminal defendant, but also the context of the invocation.
13. **Self-Incrimination: Police Officers and Sheriffs.** Relevant circumstances considered in determining whether a suspect clearly invoked the right to remain silent include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation.
14. **Self-Incrimination.** Statements made by the suspect after an invocation of the right to cut off questioning may not generally be used to interject ambiguity where originally there was none.
15. ____. A suspect is not required to use special or ritualistic phrases to invoke the right to remain silent.
16. **Self-Incrimination: Police Officers and Sheriffs.** The police do not scrupulously honor a suspect's invocation of the right to remain silent when they press on with little or no cessation in the interrogation.
17. **Trial: Evidence: Confessions: Appeal and Error.** The admission of an improperly obtained confession is a trial error, and thus, its erroneous admission is subject to the same harmless error standard as other trial errors.
18. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
19. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.
20. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for a new trial.

Steven J. Lefler, of Lefler Law Office, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

April Rogers was convicted of intentional child abuse resulting in death, a class IB felony,[1] and sentenced to life imprisonment. The primary issue presented in this appeal is whether Rogers' admission to hurting Alex Tay should have been suppressed. The record shows that when Rogers was interrogated by sheriff's officers, she tried to assert her constitutional right to remain silent, but the officers ignored her and continued to interrogate her until she was pressured into confessing. This violated clearly established decisions of the U.S. Supreme Court, which we are bound to follow. Therefore, we find that Rogers' confession was procured in violation of her Fifth Amendment right against self-incrimination, and we reverse the conviction and remand the cause for a new trial.

BACKGROUND

Rogers was convicted after a bench trial held on a stipulated record. The evidence presented at the trial showed that on Monday, December 5, 2005, Rogers was babysitting in her home for 6-month-old Alex, as well as seven other children under the age of four. Lionel Tay, Alex's father, left Alex and his brother in Rogers' care at approximately 7:30 a.m. When Alex was dropped off, he appeared healthy and had no unusual symptoms. With the exception of an ongoing acid reflux problem, Alex had no significant medical history.

Around 10 a.m., Rogers called Lionel at work. Lionel could hear gasping sounds in the background as Rogers told him she was sorry, but that she had gone upstairs to make cereal for another child and that when she returned, she observed an

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[1] See Neb. Rev. Stat. § 28-707 (Cum. Supp. 2004).

18-month-old child sitting on Alex's neck. Lionel rushed to Rogers' house.

When Lionel arrived approximately 12 minutes later, Rogers again told him, "'I'm sorry, I'm sorry.'" Lionel found that Alex was stiff and rigid, his eyes were closed, and he was gasping for breath. Lionel asked Rogers to call the 911 emergency dispatch service, and Alex was airlifted to Creighton University Medical Center. Alex was later transported to Children's Hospital, where he died on December 8, 2005.

An officer arrived at the scene and spoke with Rogers. Rogers reported to the officer that she had laid Alex on the carpeted area of the basement and gone upstairs to get milk and cereal for the children. When she went back downstairs approximately 5 minutes later, she observed an 18-month-old child bouncing and sitting on Alex's neck, straddling his head. She stated that she picked Alex up and noticed he was having trouble breathing, so she contacted Lionel. Another officer, Eric Sellers, later arrived at Rogers' house, and Rogers repeated this story to him. The two officers then went to the hospital to check on Alex's status.

At the hospital, the officers were informed that Alex had suffered a head injury and was being scheduled for immediate surgery to relieve blood pressure on his brain. A medical report dated December 5, 2005, explains: "The patient likely received blunt trauma injury to the head while at day care earlier this morning." Medical reports, dated December 5 and 6, diagnosed Alex as suffering from a "massive" traumatic brain injury resulting in an acute subdural hematoma. The hematoma was more marked posteriorly, but extended all the way from the anterior to the posterior of the brain. An ophthalmologic examination also found eye hemorrhages "consistent with non-accidental trauma." Because of the density of the hematoma, an examination on December 6 indicated that the injury had occurred within the past 0 to 4 days. Additionally, "chronic" hematomas were found in Alex's brain. The medical findings were determined to be "diagnostic of repeated episodes of inflicted trauma as aresult [sic] of shaken baby and[/]or shaken impact baby syndrome." The report of an autopsy conducted

on December 9 attributed the cause of Alex's death to "blunt trauma to the head."

Rogers was first asked to go to the Douglas County sheriff's office to be interviewed on Tuesday, December 6, 2005. At that time, the officers had apparently not yet been informed of Alex's chronic brain injuries. Rogers met with Officer Brenda Wheeler in the polygraph room with the intention of conducting a polygraph examination. But when Rogers indicated that she might be pregnant, the polygraph was postponed. It is apparent from the record that a polygraph examination could not be performed if Rogers was pregnant, although the record does not explain why. Wheeler still spoke with Rogers about the events of December 5.

Rogers explained to Wheeler that when the children first arrived in the morning, they ate breakfast. Alex went down for a nap shortly after arriving and slept in a "Pack-N-Play" until 9:15 a.m. Rogers said that when he woke up, she changed his diaper and the diaper of another child Alex's age. She put the other child in a "bouncy seat." Although Rogers had at least one other bouncy seat and two "saucers" nearby, she left Alex on the floor. Rogers could not provide Wheeler with any explanation for why she had done this.

Rogers explained that she then left all the children in the basement unattended while she went to get Alex and the other toddler's bottles, left the bottles to warm, went to the master bedroom to turn off the television, and looked in the freezer to consider what to make for lunch. Rogers told Wheeler that when she returned downstairs, she noticed that an 18-month-old child was straddling Alex's neck and that Alex was having trouble breathing. Rogers elaborated that she sometimes played "horsey" with the children. The interview ended, and Rogers returned home.

Following this interview, Wheeler received a telephone call from one of Alex's physicians, who advised Wheeler that Alex had been diagnosed with acute subdural hematomas and that there was evidence of two or three old subdural hematomas that were approximately 7 to 10 days old. The doctor clarified for Wheeler that Rogers' story of a child sitting or

bouncing on Alex's neck was inconsistent with the severity of Alex's injuries.

By Wednesday, December 7, 2005, the officers knew that Alex might not survive his injuries and had evidence that those injuries had occurred at Rogers' residence on Monday, December 5. In light of this, Sellers and another officer went to Rogers' home and asked her and her husband to come to the station for a second interview. Sellers told Rogers that the interview would probably take only about 20 or 30 minutes.

Rogers agreed and arrived at the station shortly thereafter. Her husband was separated from her to wait in the lobby. Sellers took Rogers to a small, windowless room in a secure area. There, Sellers read Rogers her *Miranda* rights, which she waived. There is no evidence at this point, or at any time thereafter, Rogers was told that she was not under arrest or that she was free to leave the station.

Shortly after Rogers waived her *Miranda* rights, Rogers and Sellers were asked by another officer to move to a different area, because of a prisoner transport. They moved to the polygraph room, where Rogers sat in a polygraph chair with her back generally to the wall, facing in the general direction of the door. The polygraph chair was placed at the end of a desk, with the back of the chair angled slightly in front of the desk.

Initially, Sellers sat at the desk facing Rogers. He took notes as he asked Rogers routine questions about the events of December 5, 2005. Rogers repeated the story she had told Wheeler the day before. This continued for about 35 minutes. Sellers then offered Rogers a glass of water and left her in the room, where she stayed in the polygraph chair waiting for about 8 minutes. When Sellers returned, he gave Rogers a glass of water and explained that they had a panel of doctors who had told them that a child could not have caused Alex's injuries. He asked Rogers to "brainstorm" about anything else that might have occurred.

Soon after, Wheeler entered the room. She immediately pulled up a chair and sat in front of Rogers, placing herself between Rogers and the door to the room. There was nothing between them, and Wheeler leaned close to Rogers. Sellers

remained in the room, but moved to a different position, standing at the opposite corner of the desk and its adjacent wall. Wheeler explained that she had spent the entire morning at Children's Hospital and had spoken to the doctors and spoken in great detail with Alex's parents. She relayed to Rogers that she had discovered nothing unusual had occurred the morning before Alex's parents took him to Rogers' house. Wheeler explained to Rogers that based on what the doctors were saying, she knew something had happened at Rogers' house that Rogers was not telling her.

The mood of the interview began to change, and Rogers became more quiet, repeatedly answering that she did not know what had happened. Wheeler explained that she did not think Rogers had meant to hurt Alex but that with all the children she was watching, anyone could have been pushed "over the top." Wheeler stated that she already knew something "aggressive" happened, but now she just needed to know why. If Rogers was just overwhelmed, then that was "explainable."

Rogers said she would never hurt Alex, and Wheeler responded that even if all the children had combined their efforts, they would not have had the force sufficient to cause the injuries Alex had suffered. Wheeler told Rogers that only an adult could have inflicted the force necessary to hurt Alex in this manner and that the injury occurred close to the time that Alex began seizing. Wheeler then reminded Rogers that she was the only adult there at that time. When Rogers stated that she did not hurt Alex, Wheeler responded, "[T]he evidence is clear that you did." When Rogers said she did not know what had happened, Wheeler told Rogers that she did not believe her.

Sellers interjected with a gentler tone and explained that Alex was going to be fine. Sellers stated that the other parents were simply concerned about whether their children were in danger. Sellers suggested that maybe some sort of accident had occurred, such as accidentally dropping Alex. This, he explained, was not a crime and would be understandable to the other parents. Sellers started to ask Rogers questions about possible accidents that could have occurred that day. Wheeler took up this line of inquiry as well, explaining: "I'm

giving you a way out here to tell me what else happened in your house."

Rogers denied that any accident had occurred, and Wheeler repeated that if they could not go to the doctors with a logical explanation for what happened, then it looked "very, very bad" for Rogers. Wheeler then spoke for some time, while Rogers remained generally quiet and repeated at several points that she did not know what had happened.

Sellers again began to speak to Rogers about possible accidents, and Wheeler left the room. Sellers moved to where Wheeler had been sitting and told Rogers he knew Rogers was a good person. Approximately 1 hour 12 minutes into the interview, Rogers began to cry. She informed Sellers that she had fallen down the stairs while holding Alex. After comforting Rogers, Sellers left, explaining that he had to go talk to his boss and that he would be right back. Rogers remained sitting in the polygraph chair for approximately 5 minutes while she waited for Sellers. When Sellers returned, he knocked on the door, and Rogers stood up for the first time since the interview had begun, let Sellers in, and immediately sat back down. Sellers mentioned that the door locked from the inside. He then began to ask some simple followup questions, but soon Wheeler walked back into the room.

Wheeler immediately went to Rogers and gave her a hug. She sat down in front of Rogers, very close to her, and grasped both of Rogers' hands. Wheeler then said firmly, "We have one more step to take here, don't we?" Wheeler explained that they had spoken with the doctors and had determined that Alex's injuries were caused by his head's being moved at a velocity much greater than what would have occurred by his falling down the stairs. Wheeler continued to sit in front of Rogers, grasping both of Rogers' hands, for another 10 minutes while she questioned her. Rogers repeatedly responded that she did not hurt Alex.

Wheeler informed Rogers, for the first time, that not only did the doctors find the acute injury that had occurred on December 5, 2005, but they had also found some older injuries. These, Wheeler explained, obviously were not caused by a fall

down the stairs on December 5. Rogers' story, Wheeler told her, had to match the medical evidence. Wheeler eventually left the room again. As she left, Wheeler stated that she knew Rogers had a good rapport with Sellers. Wheeler explained firmly that she expected Rogers to tell Sellers the truth, "and I mean the whole truth this time."

Rogers did not, however, confess to Sellers. Almost 2 hours into the interview, Sellers again left Rogers alone in the room, saying he would be right back. As he left, Sellers explained to Rogers that the door to the polygraph room locked automatically from the inside and that he did not have a key. So he asked that Rogers let him in if he knocked and further explained, "so you can get out if you need to, I just can't get in." Rogers did not attempt to leave.

Almost immediately after Sellers left, Wheeler let herself back into the room with her key and resumed her position directly in front of Rogers. Wheeler started to talk to Rogers about themes of honesty and integrity. She eventually returned to the theme of the medical evidence and how they both knew that Rogers was not telling the truth. In the face of these accusations, Rogers became increasingly withdrawn and despondent. At one point, after Wheeler repeatedly accused Rogers of holding something back, Wheeler stated: "We're not going to get to the bottom of this until I get the whole truth." Rogers responded: "No, I'm not. I'm done. I won't."

But Wheeler continued to talk to Rogers about how what "really happened" was going to "eat" at Rogers "forever and ever." Wheeler told Rogers that the doctors needed to know the truth in order "to know best how it happened, and it wasn't a fall down the stairs. Something else happened." Rogers answered: "Yes, it was. I didn't—I—I'm not talking no more."

Wheeler responded, "Well, just listen then." And Rogers sat quietly while Wheeler spoke to her at length. Wheeler was eventually able to reengage Rogers in conversation, and, some 2 hours after the interview began, Rogers confessed. Rogers eventually told Wheeler that while Alex was lying on his back on the floor, she had grabbed him by both sides of his head

and neck and shaken him. When asked, Rogers said that she thought she slammed Alex's head onto the floor each time she shook him. She also admitted to having shaken Alex on at least two prior occasions.

Rogers was not arrested on that day and was allowed to return home that night. The next day, after Alex died, an arrest warrant was issued.

At trial, Rogers filed a motion to suppress any statements she made during her interviews with investigators. Rogers claimed in her motion that her statements were not voluntarily given, her free will had been overridden, her statements were not trustworthy, she did not have an attorney present, and she had been misled by investigators before and during the interview.

At the hearing on the motion, Wheeler and Sellers both testified, and the videotape of the December 7, 2005, interview was entered into evidence. When Rogers' attorney asked Wheeler why she did not stop the interview when Rogers said she was done talking, Wheeler testified that they were trained to continue to interview suspects until the suspect says, "'I want a lawyer' or something to that effect. 'Attorney', 'lawyer', or 'I want to leave', something to the effect of 'charge me or let me leave.' Something like that. And she said neither."

The motion to suppress was overruled, and Rogers was convicted and sentenced to life imprisonment. She appeals.

ASSIGNMENTS OF ERROR

Rogers assigns that the district court erred in (1) overruling her motion to suppress her statement made to investigators, (2) imposing an excessive sentence, and (3) overruling her motion to declare that the mandatory minimum sentence of 20 years' imprisonment for child abuse resulting in death is unconstitutional because it violates the Equal Protection Clause and the Separation of Powers Clause.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established

by the U.S. Supreme Court in *Miranda v. Arizona*,[2] we apply a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law which we review independently of the trial court's determination.[3]

Mixed questions of law and fact are generally defined as those that have a factual component, but that cannot be resolved without applying the controlling legal standard to the historical facts.[4] In *State v. Thomas*[5] and *State v. Mata*,[6] we said that "[r]esolution of ambiguity in the invocation of the constitutional right to remain silent is a question of fact." To the extent that the ambiguity derives from conflicting evidence of the historical facts, such as the surrounding circumstances or what was actually said, this statement is correct. However, insofar as we have suggested that we should also treat as a question of fact the trial court's legal conclusion on whether the suspect invoked the right to remain silent, based on the application of those circumstances to the rubric of *Miranda*, we erred.

Thus, while we recognize that we have not always been precise in distinguishing issues of historical fact from questions of law within these mixed questions of law and fact,[7] for purposes of clarity and uniformity, we expressly do so now. It is a mixed question of law and fact whether a statement

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] See, *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998); *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995).

[4] See *id.*

[5] *State v. Thomas*, 267 Neb. 339, 350, 673 N.W.2d 897, 908 (2004).

[6] *State v. Mata*, 266 Neb. 668, 684, 668 N.W.2d 448, 467 (2003).

[7] See, e.g., *State v. Mata*, *supra* note 6 (resolution of ambiguity in invocation of right to remain silent question of fact); *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992) (determination that statement made voluntarily not disturbed unless clearly wrong).

was voluntarily made,[8] whether a custodial interrogation has occurred,[9] whether sufficient *Miranda* warnings were given to the suspect,[10] whether properly advised *Miranda* rights were thereafter waived,[11] whether there has been an unambiguous invocation of the right to remain silent or to have counsel,[12]

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[8] See, *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Miller v. Fenton*, 474 U.S. 104, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); *U.S. v. Walker*, 272 F.3d 407 (7th Cir. 2001); *Beavers v. State*, 998 P.2d 1040 (Alaska 2000); *People v. Jablonski*, 37 Cal. 4th 774, 126 P.3d 938, 38 Cal. Rptr. 3d 98 (2006); *People v. Matheny*, 46 P.3d 453 (Colo. 2002); *State v. Fields*, 265 Conn. 184, 827 A.2d 690 (2003); *State v. Buch*, 83 Haw. 308, 926 P.2d 599 (1996); *Light v. State*, 547 N.E.2d 1073 (Ind. 1989); *Gorge v. State*, 386 Md. 600, 873 A.2d 1171 (2005); *State v. Miller*, 573 N.W.2d 661 (Minn. 1998); *State v. Cooper*, 124 N.M. 277, 949 P.2d 660 (1997); *State v. Hyde*, 352 N.C. 37, 530 S.E.2d 281 (2000); *State v. Acremant*, 338 Or. 302, 108 P.3d 1139 (2005); *Com. v. Templin*, 568 Pa. 306, 795 A.2d 959 (2002); *State v. Morato*, 619 N.W.2d 655 (S.D. 2000); *State v. Mabe*, 864 P.2d 890 (Utah 1993); *Midkiff v. Com.*, 250 Va. 262, 462 S.E.2d 112 (1995); *State v. Singleton*, 218 W. Va. 180, 624 S.E.2d 527 (2005); *State v. Clappes*, 136 Wis. 2d 222, 401 N.W.2d 759 (1987); *Simmers v. State*, 943 P.2d 1189 (Wyo. 1997).

[9] See, e.g., *State v. Mata*, *supra* note 6; *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). See, also, *U.S. v. Moreno-Flores*, 33 F.3d 1164 (9th Cir. 1994); *People v. Matheny*, *supra* note 8; *State v. Spencer*, 149 N.H. 622, 826 A.2d 546 (2003); *State v. Juarez*, 120 N.M. 499, 903 P.2d 241 (N.M. App. 1995).

[10] *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[11] See, *U.S. v. Narvaez-Gomez*, 489 F.3d 970 (9th Cir. 2007); *People v. Platt*, 81 P.3d 1060 (Colo. 2004); *State v. Jaco*, 130 Idaho 870, 949 P.2d 1077 (Idaho App. 1997); *State v. Lockhart*, 830 A.2d 433 (Me. 2003); *State v. Dominguez-Ramirez*, 563 N.W.2d 245 (Minn. 1997); *State v. Barrera*, 130 N.M. 227, 22 P.3d 1177 (2001); *State v. Ramirez-Garcia*, 141 Ohio App. 3d 185, 750 N.E.2d 634 (2001); *Quinn v. Com.*, 25 Va. App. 702, 492 S.E.2d 470 (1997); *State v. Jennings*, 252 Wis. 2d 228, 647 N.W.2d 142 (2002).

[12] See, *U.S. v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008); *U.S. v. Uribe-Galindo*, 990 F.2d 522 (10th Cir. 1993); *Munson v. State*, 123 P.3d 1042 (Alaska 2005); *People v. Quezada*, 731 P.2d 730 (Colo. 1987); *Cuervo v. State*, 967 So. 2d 155 (Fla. 2007); *People v. Howerton*, 335 Ill. App. 3d 1023, 782 N.E.2d 942, 270 Ill. Dec. 383 (2003); *State v. Grant*, 939 A.2d 93 (Me. 2008); *People v. Glover*, 87 N.Y.2d 838, 661 N.E.2d 155, 637 N.Y.S.2d 683 (1995); *State v. Holcomb*, 213 Or. App. 168, 159 P.3d 1271 (2007); *Com. v. Redmond*, 264 Va. 321, 568 S.E.2d 695 (2002); *State v.*

and whether invocation of those rights has been scrupulously honored.[13] All these questions involve the application of the facts surrounding the confession to the constitutional rubric mandated by the U.S. Supreme Court, and are reviewed under the two-point standard of review set forth above.[14]

ANALYSIS

Miranda v. Arizona

[2] The rubric of prophylactic safeguards[15] to protect individuals from the "'inherently compelling pressures'"[16] of custodial interrogation was first established by the U.S. Supreme Court in *Miranda v. Arizona*.[17] The need for these safeguards derives from the Supreme Court's conclusion that the "coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.'"[18] Otherwise stated, the Fifth Amendment gives one the right "'"to remain silent unless he chooses to speak in the unfettered exercise of his own will."'"[19]

Earlier decisions by the U.S. Supreme Court had already established that when the totality of the circumstances of an interrogation, considered against the power of resistance of the

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Jennings, supra note 11. But see, *U.S. v. Ferrer-Montoya*, 483 F.3d 565 (8th Cir. 2007); *People v. Musselwhite*, 17 Cal. 4th 1216, 954 P.2d 475, 74 Cal. Rptr. 2d 212 (1998); *State v. Johnson*, 463 N.W.2d 527 (Minn. 1990); *Mayes v. State*, 8 S.W.3d 354 (Tex. App. 1999).

[13] See, e.g., *People v. Quezada, supra* note 12.

[14] See, *United States v. Bajakajian, supra* note 3; *Thompson v. Keohane, supra* note 3.

[15] *Withrow v. Williams*, 507 U.S. 680, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). See, also, e.g., *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[16] *Thompson v. Keohane, supra* note 3, 516 U.S. at 107, quoting *Miranda v. Arizona, supra* note 2.

[17] *Miranda v. Arizona, supra* note 2.

[18] *Dickerson v. United States*, 530 U.S. 428, 435, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), quoting *Miranda v. Arizona, supra* note 2.

[19] *Withrow v. Williams, supra* note 15, 507 U.S. at 689.

person confessing, actually operate to overbear the suspect's will and compel the confession, then the confession would be considered involuntary and inadmissible.[20] The focus of the Supreme Court in *Miranda* was somewhat different. The Court explained that while the pressures of the average custodial interrogation may not produce a confession that is "involuntary in traditional terms,"[21] in the context of modern methods of custodial police interrogation,[22] neither is any statement obtained from the interrogation "truly . . . the product of his free choice."[23] Instead, the pressures of custodial interrogation "work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[24]

The Court in *Miranda* described in great detail the pressures to which it was referring: A suspect is usually questioned away from his or her familiar environment and isolated from family or friends who might lend moral support. Having isolated the suspect, the questioning officer or officers then use "'emotional appeals and tricks,'"[25] minimizing the moral seriousness of the offense and directing comment toward the reasons why the suspect committed the offense, "rather than court failure by asking the subject whether he did it."[26] A common tactic is then for one officer to act sympathetic, while the other is more forceful, and the two trade off in questioning the suspect. When these strategies do not produce a confession, the officers rely "'on an oppressive atmosphere of dogged persistence'" and attempt to "'dominate [their]

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[20] See, e.g., *Stein v. New York*, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953), *overruled in part on other grounds, Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). See, also, *Dickerson v. United States, supra* note 18.

[21] *Miranda v. Arizona, supra* note 2, 384 U.S. at 457.

[22] *Dickerson v. United States, supra* note 18.

[23] *Miranda v. Arizona, supra* note 2, 384 U.S. at 458.

[24] *Id.*, 384 U.S. at 467.

[25] *Id.*, 384 U.S. at 451.

[26] *Id.*, 384 U.S. at 450.

subject and overwhelm him with [their] inexorable will to obtain the truth.'"[27]

The Court noted that to be successful in this psychological coercion, "[i]t is important to keep the subject off balance . . . by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights."[28] Thus, "[e]ven without employing brutality, . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[29]

[3] To counter these pressures, and thereby to "protect precious Fifth Amendment rights,"[30] the Court in *Miranda* established the familiar *Miranda* advisements of the right to remain silent and to have an attorney present at questioning. The Court further explained that once these warnings have been given, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[31] For, "[a]t this point[,] he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."[32]

[4] The Court described this as the right to "cut off questioning."[33] And it does not matter, the Court explained, whether or not the suspect had initially waived his or her rights and answered questions: "The mere fact that [the suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."[34]

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[27] *Id.*, 384 U.S. at 451.

[28] *Id.*, 384 U.S. at 455.

[29] *Id.*

[30] *Id.*, 384 U.S. at 457.

[31] *Id.*, 384 U.S. at 473-74.

[32] *Id.*, 384 U.S. at 474.

[33] *Id.*

[34] *Id.*, 384 U.S. at 445.

In this appeal, Rogers does not argue that the evidence proves her statement was involuntary in the sense that her will was actually overborne. Nor does she argue that she was improperly advised of her *Miranda* rights or that she did not initially waive those rights. Instead, Rogers' claim is that the officers failed to honor her right to cut off questioning.

[5] In subsequent cases, the U.S. Supreme Court has explained that once the right to cut off questioning has been invoked, the police are restricted to "'scrupulously honor[ing]'" that right.[35] This means, among other things, that there must be an appreciable cessation to the interrogation.[36] However, before the police are under such a duty, the invocation of the right to cut off questioning must be "unambiguous," "unequivocal," or "clear."[37] This requirement of an unequivocal invocation, the Court has explained, prevents the creation of a "third layer of prophylaxis" which could transform the prophylactic rules of *Miranda* "'into wholly irrational obstacles to legitimate police investigative activity.'"[38] To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent.[39] And if the suspect's statement is not an "unambiguous or unequivocal" assertion of the right to remain silent, then there is nothing to "scrupulously honor" and the officers have no obligation to stop questioning.[40] In this case,

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[35] See, e.g., *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975); *State v. Pettit*, 227 Neb. 218, 417 N.W.2d 3 (1987).

[36] *Michigan v. Mosley, supra* note 35.

[37] *Davis v. United States*, 512 U.S. 452, 460, 462, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

[38] *Id*.

[39] See *In re Interest of Frederick C.*, 8 Neb. App. 343, 594 N.W.2d 294 (1999). See, also, *Davis v. United States, supra* note 37; *U.S. v. Mikell*, 102 F.3d 470 (11th Cir. 1996); *State v. Walker*, 129 Wash. App. 258, 118 P.3d 935 (2005).

[40] *Michigan v. Mosley, supra* note 35. See *Davis v. United States, supra* note 37.

the district court determined that Rogers had failed to unambiguously invoke her right to cut off questioning.

Scope of Rogers' Motion to Suppress

Before addressing the merits of whether Rogers did or did not unambiguously invoke her right to remain silent, we briefly address the State's argument that the issue of Rogers' invocation of her right to cut off questioning was never properly raised below. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[41]

Rogers' motion alleged, among other things, that her confession was not "voluntarily made." But the State asserts that, as a matter of law, references to "voluntariness" refer only to an inquiry into whether the will of the suspect was actually overborne, and do not encompass the issues raised by *Miranda*.[42] As our discussion above of the Court's holding in *Miranda* already demonstrates, this is simply not true. The U.S. Supreme Court has explicitly stated that it recognizes "two constitutional bases for the requirement that a confession be *voluntary* to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment."[43] Cases examining whether the defendant's will was overborne by the circumstances surrounding the giving of a confession fall under the Due Process Clause of the 14th Amendment[44]; cases examining the prophylactic safeguards established in *Miranda* and its progeny fall under the 5th Amendment's Self-Incrimination Clause (incorporated and made applicable to the states through the 14th Amendment).[45]

Moreover, it is clear from the hearing on the motion to suppress that the parties were actively presenting to the court their

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[41] *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007).

[42] Supplemental brief for appellee at 8.

[43] *Dickerson v. United States*, *supra* note 18, 530 U.S. at 433 (emphasis supplied).

[44] *Dickerson v. United States*, *supra* note 18.

[45] See *id.*

views on whether Rogers had unambiguously invoked her right to remain silent. Thus, the court, in its order, actually determined that Rogers had not "unequivocally demand[ed] that any of the interviews be terminated."

Rogers' motion did not limit itself to "voluntariness" issues under the 14th Amendment, and we agree that voluntariness inquiries under both the 5th and the 14th Amendments were properly before the trial court. Having found that the constitutional issues involving Rogers' claimed unequivocal invocation of her right to remain silent were raised below, we turn now to an analysis of those issues.

CUSTODY

[6] Before considering whether the police infringed upon a suspect's Fifth Amendment right to cut off questioning, a court should first consider whether the suspect's confession took place during a "custodial interrogation." The rights provided by *Miranda* and its progeny, including the right that the police "scrupulously honor" one's invocation of the right to remain silent, are only applicable in the context of a "custodial interrogation."[46] It is only in this context that the prophylactic safeguards of *Miranda* are considered justified and necessary.

[7,8] "Interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.[47] "Custodial" does not require an arrest, but refers to situations where a reasonable person in the defendant's situation would not have felt free to leave—and thus would feel the "'"restraint on freedom of movement" of the degree associated with a formal arrest.'"[48]

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[46] See, *State v. Mata*, *supra* note 6. See, also, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977); *State v. Burdette*, *supra* note 9.

[47] *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

[48] *Thompson v. Keohane*, *supra* note 3, 516 U.S. at 112, quoting *Miller v. Fenton*, *supra* note 8. Accord *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004).

The parties do not dispute that Rogers was being "interrogated" by the officers at the time she made her confession, but some question has been raised as to whether Rogers was in custody at the time she confessed.

We note at the outset that it appears, from the examination of the witnesses and the discussion with the court during the suppression hearing, that there was little dispute between the parties at that time that Rogers was, in fact, "in custody" when she confessed. When examining the witnesses at the suppression hearing, the State did not ask questions that would have been relevant to the issue of custody. Instead, the examination was focused almost entirely on Rogers' alleged invocation of her right to remain silent. As discussed, if Rogers was not in custody, the alleged invocation of her Fifth Amendment rights would not even have been at issue. The trial record indicates that the parties and the district court believed Rogers was in custody.

In accord with the assumptions of the parties, the district court determined that Rogers was in custody at the time of her confession. The district court's order, while not perfectly drafted, is hard to read otherwise. In denying the motion to suppress, the court first described the two interviews of Rogers at the sheriff's office. The court next described Rogers' informal conversations with the officers at Rogers' home and over the telephone, during which, the court specified, Rogers was "not in custody." Immediately following these two descriptions, the court said that "the statements of [Rogers] both while not in custody and while in custody were freely and voluntarily made." The court clearly found that some of Rogers' statements were custodial, and, having expressly eliminated the interviews not at the station, we find it difficult not to understand the district court's reference to times "in custody" to be the previously mentioned station house interviews.

Now, on appeal, the State belatedly attempts to contest whether Rogers was in custody at the time of her confession. But even the State's initial brief, while alleging that Rogers was not in custody on December 6, 2005, seemed to assume that she was in custody on December 7. As at trial, the State argued in its trial brief that Rogers had failed to properly invoke the

Miranda protections. But in a supplemental brief filed in this court, the State asserted a new argument that "because there was no formal arrest nor any restraint on freedom of movement of the degree associated with a formal arrest, during either the December 6, 2005, or the December 7, 2005, interview, Rogers was not in custody."[49] Rather than give any supporting argument for this conclusion, however, the State attacked the wording of Rogers' motion to suppress, an argument that we have already considered above.

But to the extent that the State's supplemental brief can be construed as attacking the district court's determination that Rogers was in custody during the December 7, 2005, interrogation, we disagree with the State's contention. The parties do not contest the underlying historical facts of this case. We have information about the events leading up to Rogers' arrival at the station on December 7, as derived from the sheriff's reports and testimony. We have the videotape of the interview itself. Because we have no questions of fact to review for clear error, the only issue remaining is the application of the historical facts to the applicable constitutional principles.[50] We independently review the district court's conclusion regarding whether, under these facts, a reasonable person under all of the surrounding circumstances would have felt free to leave.[51] We agree with the district court that under the facts of this case, Rogers was in "custody" on December 7.

[9,10] The U.S. Supreme Court has explained that the relevant inquiry in determining "custody" is whether, given the objective circumstances of the interrogation,[52] "a reasonable

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[49] Supplemental brief for appellee at 8.

[50] See, e.g., *Yarborough v. Alvarado*, *supra* note 48; *State v. Smith*, 13 Neb. App. 404, 693 N.W.2d 587 (2005).

[51] See, e.g., *U.S. v. Moreno-Flores*, *supra* note 9; *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007); *State v. Mata*, *supra* note 6; *State v. Burdette*, *supra* note 9; *People v. Matheny*, *supra* note 8; *State v. Spencer*, *supra* note 9; *State v. Juarez*, *supra* note 9. See, also, *Yarborough v. Alvarado*, *supra* note 48; *Thompson v. Keohane*, *supra* note 3.

[52] *Stansbury v. California*, 511 U.S. 318, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994).

person [would] have felt he or she was not at liberty to terminate the interrogation and leave."[53] This is the level of "restraint on freedom of movement"[54] that demands *Miranda* protections in connection with an interrogation. Two inquiries are essential to this determination: (1) an assessment of the circumstances surrounding the interrogation and (2) whether, given those circumstances, a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.[55] Put another way, the Court has said that we must examine all of the circumstances surrounding the interrogation to determine whether a reasonable person in the suspect's position would have thought he or she was "sitting in the interview room as a matter of choice, free to change his [or her] mind and go."[56]

A large body of case law has developed since *Miranda* that has made apparent certain circumstances that are most relevant to the custody inquiry. Such circumstances include: (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave; (2) whether the contact with the police was initiated by them or by the person interrogated, and, if by the police, whether the defendant voluntarily agreed to the interview; (3) whether the defendant was told he or she was free to terminate the interview and leave at any time; (4) whether there were restrictions on the defendant's freedom of movement during the interrogation; (5) whether neutral parties were present at any time during the interrogation; (6) the duration of the interrogation; (7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and (8) whether the police manifested to the defendant

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[53] *Thompson v. Keohane, supra* note 3, 516 U.S. at 112.

[54] *Id.*

[55] See *State v. McKinney, supra* note 51. Accord *Yarborough v. Alvarado, supra* note 48.

[56] *Kaupp v. Texas*, 538 U.S. 626, 632, 123 S. Ct. 1843, 155 L. Ed. 2d 814 (2003).

a belief that the defendant was culpable and that they had the evidence to prove it.[57]

In *State v. Mata*,[58] we also found helpful to our analysis of whether the suspect was in custody, six common indicia outlined by the Eighth Circuit Court of Appeals in *U.S. v. Axsom*.[59] Three of these indicia are considered mitigating against the existence of custody: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; or (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions. Three indicia are considered as aggravating the existence of custody: (1) whether strong-arm tactics or deceptive stratagems were used during questioning, (2) whether the atmosphere of the questioning was police dominated, or (3) whether the suspect was placed under arrest at the termination of the proceeding.

Any interview of one suspected of a crime by a police officer will have coercive aspects "simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[60] Such coercion, alone, is insufficient to establish the "restraint on freedom of movement" necessary for "custody."[61] Nevertheless, we note that in determining whether a reasonable person in the suspect's position would feel the necessary restraint on freedom of movement, the coerciveness of the interrogation environment is still pertinent[62]:

> Because the Court in *Miranda* expressed concern with the coerciveness of situations in which the suspect was

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[57] See Annot., 29 A.L.R.6th 1 (2007).

[58] *State v. Mata*, *supra* note 6.

[59] *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

[60] *Oregon v. Mathiason*, *supra* note 46, 429 U.S. at 495.

[61] *Id.*

[62] See *State v. Pontbriand*, 178 Vt. 120, 878 A.2d 227 (2005).

> "cut off from the outside world" and "surrounded by antagonistic forces" in a "police dominated atmosphere" and interrogated "without relent," circumstances relating to those kinds of concerns are also relevant on the custody issue. Thus, custody is less likely to be deemed present when the questioning occurred in the presence of the suspect's friends or other third parties, and more likely to be found when the police have removed the suspect from such individuals. A court is more likely to find the situation custodial when the suspect was confronted by several officers instead of just one, when the demeanor of the officer was antagonistic rather than friendly, and when the questioning was lengthy rather than brief and routine. And surely a reasonable person would conclude he was in custody if the interrogation is close and persistent, involving leading questions and the discounting of the suspect's denials of involvement.[63]

The facts of any given particular station house interrogation will be unique. While we will not find another case that exactly matches the situation presented here, for illustration of how these legal principles are applied in comparable circumstances, we consider *State v. Dedrick*.[64] In *Dedrick*, the defendant voluntarily went to the police station after they had asked him to come answer some questions. Once at the station, the police told the defendant he was not under arrest and took him to an interview room. The room was windowless, and the defendant and two officers sat at a round table. Throughout the interview, one officer sat in front of the door, while the other sat opposite, and the defendant sat in between them. The door remained closed, but apparently was not locked. The defendant initially drank a soda he had brought with him and answered general questions about his background and activities. At one point, he left the room alone to use the restroom.

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[63] 2 Wayne R. LaFave et al., Criminal Procedure § 6.6(f) at 750-51 (3d ed. 2007).

[64] *State v. Dedrick*, 132 N.H. 218, 564 A.2d 423 (1989), *abrogated in part on other grounds, State v. Spencer*, *supra* note 9.

After the defendant had completed his initial story about the events of the night of the crime, the officers left the defendant alone in the room so that they could confer. When the officers returned, the nature of the questioning changed. The officers again stated that the defendant was not under arrest, and they read him his *Miranda* rights. They then informed the defendant for the first time that the victim was dead. They further informed the defendant that they knew the victim owed the defendant money. And they stated that bloody fingerprints and footprints found at the scene probably matched the defendant's. Despite the defendant's repeated denials of any involvement in the murder, the officers continued to accuse the defendant of stating untruths, and they continued to confront him with incriminating information. They no longer reminded him that he was not under arrest.

The court in *Dedrick* agreed with the trial court's determination that this "sea change" in the tenor and character of the interview would indicate to a reasonable person that he or she was not free to go.[65] Instead, a reasonable person would have believed that "as often as he made denials, [the officers] would renew their accusations."[66] In the face of such repeated accusations, a reasonable person, the court concluded, would believe he or she was not free to leave.[67]

We likewise conclude that Rogers was "in custody," because a reasonable person in her position would not have felt free to simply terminate the interview and leave. In making this

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[65] *Id.* at 225, 564 A.2d at 427.

[66] *Id.*

[67] See, *Stansbury v. California*, *supra* note 52; *U.S. v. Mittel-Carey*, 456 F. Supp. 2d 296 (D. Mass. 2006); *People v. Horn*, 790 P.2d 816 (Colo. 1990); *Cotton v. State*, 901 So. 2d 241 (Fla. App. 2005); *People v Johnson*, 91 A.D.2d 327, 458 N.Y.S.2d 775 (1983); *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003). Compare, *People v. Downer*, 192 Colo. 264, 557 P.2d 835 (1976); *State v. Pitts*, 936 So. 2d 1111 (Fla. App. 2006); *Burton v. State*, 32 Md. App. 529, 363 A.2d 243 (1976); *Com. v. Mayfield*, 398 Mass. 615, 500 N.E.2d 774 (1986); *Sandifer v. State*, No. 89729, 2004 WL 944021 (Kan. App. Apr. 30, 2004) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 88 P.3d 807 (Kan. App. 2004)).

determination, we consider the *Axsom* indicia, as well as the additional considerations outlined above.

Strictly speaking, Rogers went to the station voluntarily. But we also note that her visit was prompted by two officers arriving at her house and asking her to return to the station for further questioning and a possible polygraph examination. In light of these circumstances suggesting that Rogers was pressured to attend, the "voluntariness" of Rogers' visit to the station is less of a mitigator against custody.

And once at the station, the atmosphere was clearly police dominated. Rogers was separated from her husband and any neutral parties and taken to a secure area to be read her *Miranda* rights and questioned. Rogers was then escorted to the polygraph room where she sat in an examination chair for over 2 hours while being questioned intensively by two officers.

Although Rogers was not physically restrained during the interrogation, in the sense of being handcuffed or locked in a room, the positioning of the officers during questioning would have made it hard for her to leave. We note that Rogers would have had a hard time even standing up when Wheeler was grasping both of her hands. Additionally, with the exception of brief periods during which Rogers waited in the room alone, once the interrogation became more accusatory, Rogers' only exit from the room was continuously blocked by either Sellers or Wheeler sitting very close, knee to knee, in front of her.

After its initial phase, the questioning of Rogers became verbally dominated by the officers—confrontational, and more aggressive. Wheeler told Rogers that they knew she had hurt Alex and that they only sought answers as to her motivation. Sellers made clear to Rogers that shaking a baby would be a crime, while a fall or similar accident would not be. Sellers also told Rogers, deceptively, that Alex was going to be okay, although Sellers knew this to be untrue. Once Rogers was caught in a lie about falling down the stairs, Rogers was no longer given the impression that an accident would suffice as an explanation. She was expected to admit in detail to what the officers already knew she had done. Some sort of aggression

by Rogers against Alex was, as Wheeler stated, the only logical explanation for the medical evidence.

A statement by the officers to Rogers that she was free to go obviously could have had a significant impact on whether a reasonable person in Rogers' position would have felt free to go.[68] Rogers was not, however, told she was free to go—not even once. In fact, when Rogers finally declared that she was "done" and was not going to talk any more, the officers still failed to indicate in any way that she was free to leave. To the contrary, Rogers was told to "just listen then." Rather than being told she was free to leave, Rogers was essentially told to sit there and listen.

We find Sellers' statement regarding the functioning of the door to the room merely an explanation to Rogers that she was not being locked in alone. Being physically capable of getting out of a room is not the same as being given permission to walk out of a station full of police officers and simply go home.

It is true that Rogers was, after she confessed, eventually allowed to go home. But we find this fact to be of little consequence, compared to the other indicia of custody, when a reasonable person in Rogers' position at the time of her confession would not have believed that was going to occur. Rogers was essentially told that the officers had probable cause to arrest her. Knowing this, without additional circumstances indicating

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[68] See, *State v. McKinney*, *supra* note 51; *State v. Saltzman*, 224 Neb. 74, 395 N.W.2d 530 (1986). See, also, *U.S. v. Galceran*, 301 F.3d 927 (8th Cir. 2002); *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000); *U.S. v. Fazio*, 914 F.2d 950 (7th Cir. 1990); *Wilson v. Fairman*, 166 Fed. Appx. 267 (9th Cir. 2006); *U.S. v. Hemmings*, 64 Fed. Appx. 68 (9th Cir. 2003); *Betts v. State*, 799 P.2d 325 (Alaska App. 1990); *State v. Turner*, 267 Conn. 414, 838 A.2d 947 (2004); *Loredo v. State*, 836 So. 2d 1103 (Fla. App. 2003); *McAllister v. State*, 270 Ga. 224, 507 S.E.2d 448 (1998); *People v. Urban*, 196 Ill. App. 3d 310, 553 N.E.2d 740, 143 Ill. Dec. 33 (1990); *Luna v. State*, 788 N.E.2d 832 (Ind. 2003); *State v. Boldridge*, 274 Kan. 795, 57 P.3d 8 (2002); *Allen v. State*, 158 Md. App. 194, 857 A.2d 101 (2004); *Sullivan v. State*, 585 N.W.2d 782 (Minn. 1998); *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002); *State v. Roble-Baker*, 340 Or. 631, 136 P.3d 22 (2006); *State v. Marini*, 638 A.2d 507 (R.I. 1994); *State v. Davis*, 735 S.W.2d 854 (Tenn. Crim. App. 1987); *State v. Pontbriand*, *supra* note 62.

otherwise, it is hard to imagine that a reasonable person in Rogers' position would think that the officers would allow that person to just get up and leave.

Rogers experienced approximately 2 hours of isolation in a police-dominated atmosphere, physically blocked from the exit, and subjected to aggressive accusatorial interrogation in which she was confronted with substantial evidence to prove her guilty of a crime. Rogers was "in custody" for purposes of the *Miranda* protections.

Unequivocal Invocation

The next inquiry is whether Rogers invoked the *Miranda* protections to which she was entitled. Rogers claims she invoked the right to remain silent and that the officers failed to scrupulously honor that right. Like custody, the question of whether a suspect has invoked the right to remain silent is a mixed question of law and fact.[69] We thus review the district court's findings of historical fact for clear error, but review de novo the application of the constitutional principles to these facts.[70] In this case, there are no historical facts in dispute and all the circumstances relevant to the invocation question are contained in the videotape of the December 7, 2005, interrogation. The only question is whether, as a matter of law, a reasonable police officer presented with these circumstances would have understood Rogers' statement as an invocation of the right to remain silent.[71]

[11] As mentioned, the safeguards of *Miranda* "'assure that the individual's right to choose between speech and silence

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[69] See, *U.S. v. Rodriguez*, *supra* note 12; *U.S. v. Uribe-Galindo*, *supra* note 12; *Munson v. State*, *supra* note 12; *People v. Quezada*, *supra* note 12; *Cuervo v. State*, *supra* note 12; *People v. Howerton*, *supra* note 12; *State v. Grant*, *supra* note 12; *State v. Holcomb*, *supra* note 12; *Com. v. Redmond*, *supra* note 12; *State v. Jennings*, *supra* note 11.

[70] See *id.* See, also, generally, *Thompson v. Keohane*, *supra* note 3.

[71] See, e.g., *Davis v. United States*, *supra* note 37; *Robinson v. State*, 373 Ark. 305, 283 S.W.3d 558 (2008) (Glaze, J., dissenting); *People v. Arroya*, 988 P.2d 1124 (Colo. 1999); *State v. Day*, 619 N.W.2d 745 (Minn. 2000); *People v. Douglas*, 8 A.D.3d 980, 778 N.Y.S.2d 622 (2004); *State v. Tuttle*, 650 N.W.2d 20 (S.D. 2002).

remains unfettered throughout the interrogation process.'"[72] The suspect has the right to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation."[73]

On the other hand, officers should not have to guess when a suspect has changed his or her mind and wishes the questioning to end. They are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.[74] Instead, officers are bound only when the suspect makes a statement that, considered under the circumstances in which it is made, a reasonable police officer would have understood to be a request to cut off all questioning.[75] In other words, to effectively invoke the protections of *Miranda*, the suspect's invocation of the right to remain silent must be "unambiguous," "unequivocal," or "clear."[76]

[12,13] In considering whether a suspect has clearly invoked the right to remain silent, we review not only the words of the criminal defendant, but also the context of the invocation.[77] Relevant circumstances include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior

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[72] *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987) (emphasis omitted), quoting *Miranda v. Arizona*, *supra* note 2.

[73] *Michigan v. Mosley*, *supra* note 35, 423 U.S. at 103-04.

[74] *State v. Thomas*, *supra* note 5; *State v. Mata*, *supra* note 6; *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986).

[75] See, e.g., *Davis v. United States*, *supra* note 37; *Robinson v. State*, *supra* note 71 (Glaze, J., dissenting); *People v. Arroya*, *supra* note 71; *State v. Day*, *supra* note 71; *State v. Tuttle*, *supra* note 71.

[76] *Davis v. United States*, *supra* note 37, 512 U.S. at 460, 462.

[77] See, *Davis v. United States*, *supra* note 37; *Abela v. Martin*, 380 F.3d 915 (6th Cir. 2004); *Robinson v. State*, *supra* note 71; *People v. Arroya*, *supra* note 71; *State v. Tuttle*, *supra* note 71. See, also, *Smith v. Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984).

during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation.[78] A court might also consider the questions that drew the statement, as well as the officer's response to the statement.[79]

As is the case for the custody inquiry, while a determination of invocation will always depend on an analysis of the circumstances in a particular case, patterns have emerged from the case law that provide context to our application of these rules. For instance, generally, courts have found statements prefaced by words of equivocation, such as "I think," "maybe," or "I believe," or phrased in terms of a hypothetical, such as, "'If I don't answer any more questions, then what happens?'"[80] to be equivocal, although the surrounding circumstances are still considered before making this conclusion.[81] In *Com. v. Almonte*,[82] for example, the court rejected the defendant's argument that he had clearly invoked his right to remain silent by saying, "'*I believe* I've said what I have to say.'" In so concluding, the court looked not only to the language of this "isolated remark,"[83] but also to the surrounding circumstances—that the defendant had initiated the confession by coming to the police station unbidden and had seemed calm and under control throughout the interrogation.

Even absent express words of equivocation, it is unlikely for a statement to be an unequivocal invocation of the right to remain silent if the language of the statement itself indicates

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[78] *People v. Arroya*, *supra* note 71. See, also, *People v. Glover*, *supra* note 12.

[79] *Id.*

[80] See *People v. Pierce*, 223 Ill. App. 3d 423, 430, 585 N.E.2d 255, 260, 165 Ill. Dec. 859, 864 (1991).

[81] See, e.g., *Davis v. United States*, *supra* note 37; *Clark v. Murphy*, 331 F.3d 1062 (9th Cir. 2003); *Mohn v. Bock*, 208 F. Supp. 2d 796 (E.D. Mich. 2002).

[82] *Com. v. Almonte*, 444 Mass. 511, 517, 829 N.E.2d 1094, 1099 (2005) (emphasis supplied), *overruled in part on other grounds*, *Com. v. Carlino*, 449 Mass. 71, 865 N.E.2d 767 (2007).

[83] *Id.* at 519, 829 N.E.2d at 1101.

simply that the suspect has finished his or her colloquy of events—as opposed to a wish to cease speaking altogether.[84] Thus, in light of the circumstances presented, statements such as "'that's it'"[85] and "'So, that's all I [got] to say'"[86] have been found not to be clear invocations of *Miranda* rights. Conversely, where the suspect says he or she is not yet ready to speak, "now," or "at this time," courts have likewise found, under the circumstances presented, that the statement was equivocal.[87]

Statements which indicate only the suspect's desire to avoid answering a particular question or to avoid speaking about particular themes have also been held, under the circumstances, not to trigger *Miranda* protections.[88] This is because an invocation of the right to remain silent is a communication that the suspect wishes questioning as a whole to cease.[89]

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[84] See, *Gamble v. State*, 791 So. 2d 409 (Ala. Crim. App. 2000); *Denny v. State*, 617 So. 2d 323 (Fla. App. 1993); *State v. McCorkendale*, 267 Kan. 263, 979 P.2d 1239 (1999); *State v. Birth*, 37 Kan. App. 2d 753, 158 P.3d 345 (2007). See, also, *State v. Thomas*, *supra* note 5.

[85] *Denny v. State*, *supra* note 84, 617 So. 2d at 324.

[86] *State v. McCorkendale*, *supra* note 84, 267 Kan. at 273, 979 P.2d at 1247.

[87] See, *U.S. v. Al-Muqsit*, 191 F.3d 928 (8th Cir. 1999), *vacated in part on other grounds*, *U.S. v. Logan*, 210 F.3d 820 (8th Cir. 2000); *State v. Bieker*, 35 Kan. App. 2d 427, 132 P.3d 478 (2006); *Com. v. Leahy*, 445 Mass. 481, 838 N.E.2d 1220 (2005); *State v. Ganpat*, 732 N.W.2d 232 (Minn. 2007); *State v. Holcomb*, *supra* note 12; *State v. Sabetta*, 680 A.2d 927 (R.I. 1996); *Calderon-Hernandez v. Trombley*, No. 06-CV-11665, 2007 WL 4181274 (E.D. Mich. Nov. 27, 2007) (unpublished opinion).

[88] *U.S. v. Thomas*, 358 F. Supp. 2d 1100 (M.D. Ala. 2005); *Centobie v. State*, 861 So. 2d 1111 (Ala. Crim. App. 2001); *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995); *State v. Wright*, 196 Wis. 2d 149, 537 N.W.2d 134 (Wis. App. 1995). Compare, *Cuervo v. State*, *supra* note 12; *Almeida v. State*, 737 So. 2d 520 (Fla. 1999); *People v. Aldridge*, 79 Ill. 2d 87, 402 N.E.2d 176, 37 Ill. Dec. 286 (1980); *State v. Deases*, 518 N.W.2d 784 (Iowa 1994); *Freeman v. State*, 158 Md. App. 402, 857 A.2d 557 (2004); *State v. Jobe*, 486 N.W.2d 407 (Minn. 1992); *People v. Brown*, 266 A.D.2d 838, 700 N.Y.S.2d 605 (1999).

[89] *U.S. v. Thomas*, *supra* note 88; *State v. Williams*, 535 N.W.2d 277 (Minn. 1995). See, also, *State v. Day*, *supra* note 71.

[14] Finally, courts have found, under certain circumstances, that a suspect fails to unequivocally invoke the right to remain silent when what might otherwise be a clear statement is inextricably attached to language inconsistent with a wish to remain silent. While statements made by the suspect after an invocation of the right to cut off questioning may not generally be used to interject ambiguity where originally there was none,[90] the analysis is different where a single statement under consideration is internally inconsistent. Courts have thus found ambiguity where an utterance conveying a desire to end questioning is "separated by little more than a breath"[91] from further utterances that would lead a reasonable officer to doubt whether the defendant in fact wished to do so.[92]

In *State v. Thomas*, for instance, we found that the defendant had not clearly invoked the right to remain silent when his statement, "'I'm done talkin' man,'" was followed directly by "a question requesting further information, which also acted to encourage further dialog."[93] The statement Kelvin L. Thomas made to police during questioning was, "'I'm done talkin' man, I know what I did, how can ya'll keep on saying I did it[?]'"[94] The statement, we observed, was made when Thomas interrupted accusations by the officers. And Thomas continued to converse with the officers after he made the statement. We concluded that a reasonable police officer could have interpreted this "single statement" as merely an expression of Thomas' frustration with the investigators' unwillingness to

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[90] See, *Smith v. Illinois*, *supra* note 77; *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008).

[91] *Mayes v. State*, *supra* note 12, 8 S.W.3d at 359.

[92] *U.S. v. Stepherson*, 152 Fed. Appx. 904 (11th Cir. 2005); *State v. Thomas*, *supra* note 5; *State v. Pitts*, *supra* note 67; *State v. Whipple*, 134 Idaho 498, 5 P.3d 478 (Idaho App. 2000); *Haviland v. State*, 677 N.E.2d 509 (Ind. 1997); *Furnish v. Com.*, 95 S.W.3d 34 (Ky. 2002); *State v. Jones*, 333 Mont. 294, 142 P.3d 851 (2006); *People v. Lowin*, 36 A.D.3d 1153, 827 N.Y.S.2d 782 (2007); *State v. Jackson*, 107 Ohio St. 3d 300, 839 N.E.2d 362 (2006). Compare *State v. Astello*, 602 N.W.2d 190 (Iowa App. 1999).

[93] *State v. Thomas*, *supra* note 5, 267 Neb. at 350, 673 N.W.2d at 908.

[94] *Id.*

believe him.[95] It was not, therefore, "a clearly stated intent to end the interview."[96]

On the other hand, certain types of statements, neither prefaced nor immediately followed by words diminishing their meaning, are generally considered to be clear and unambiguous invocations of the right to cut off questioning. For instance, when the defendant in *Anderson v. Terhune*[97] attempted to stop police questioning by stating, "'I don't even wanna talk about this no more,'" "'Uh! I'm through with this,'" and "'I plead the Fifth,'" the court held that the defendant's invocation of his right to remain silent was not only unequivocal, but "pristine." Similarly, the court in *State v. Goetsch*[98] found the suspect's statement, "'I don't want to talk about this anymore,'" to be clear, and the statement, "'I don't want to talk no more,'" was found by the court in *Com. v. King*[99] to be likewise unambiguous. The court in *People v. Douglas*[100] concluded that the defendant's statement, "'I have nothing further to say,'" could not have been interpreted by a reasonable police officer as anything other than an expression that he wished to stop answering police questions, and thus, remain silent.

In *Mayes v. State*,[101] the suspect, after waiving her *Miranda* rights and speaking for approximately 30 minutes about how she thought she was being framed, stated, "'I'm going to stop talking'" when the interrogation became more confrontational. The officer continued speaking to the suspect, and 4 minutes later, the suspect said, "'I'm going to shut up. I'm not going to say another goddamned thing.'"[102] The court concluded

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[95] *Id.*

[96] *Id.*

[97] *Anderson v. Terhune*, *supra* note 90, 516 F.3d at 784.

[98] *State v. Goetsch*, 186 Wis. 2d 1, 6, 519 N.W.2d 634, 636 (Wis. App. 1994).

[99] *Com. v. King*, 34 Mass. App. 466, 468, 612 N.E.2d 690, 691 (1993).

[100] *People v. Douglas*, *supra* note 71, 8 A.D.3d at 980, 778 N.Y.S.2d at 623. Compare *State v. McCorkendale*, *supra* note 84.

[101] *Mayes v. State*, *supra* note 12, 8 S.W.3d at 357.

[102] *Id.*

that these statements evinced an unequivocal declaration of her desire to halt further comment—which thus obligated the officers to end their interrogation.[103] Similarly, "'I'm done talking'" was a sufficient invocation of the right to remain silent in *State v. Kramer*,[104] and several cases have held that the simple statement "I'm done" was a clear invocation under the circumstances surrounding the interrogation.[105]

In this case, we conclude that Rogers unambiguously invoked her right to remain silent. When Wheeler kept insisting that they were going to "get to the bottom of this" and "get the whole truth," Rogers responded: "No, I'm not. I'm done. I won't." But Wheeler pressed on at length about how guilt would "eat" at Rogers "forever and ever" if she did not confess. While working these themes, Wheeler tried to reengage Rogers with direct questions, but Rogers answered only with simple "no's." When Wheeler then tried the accusation, "and it wasn't a fall down the stairs. Something else happened," Rogers responded in no uncertain terms: "Yes, it was. I didn't—I—*I'm not talking no more*." (Emphasis supplied.)

Nothing before or after Rogers' statements marred their clarity. Rogers said that she was "done," she would no longer be helping Wheeler to "get to the bottom of this," and she was "not talking no more." Furthermore, we observe that Rogers' demeanor and tone when making these statements conveyed the finality with which she intended them. Rogers did not seek to reengage in conversation, but sat silent immediately after making the statements.

Not only should a reasonable officer in Wheeler's position have understood those statements to be an invocation of the right to remain silent, it appears that Wheeler actually understood the statements in this way, because Wheeler responded: "Well, just listen then." Wheeler's instruction to "just listen"

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[103] *Mayes v. State*, *supra* note 12.

[104] *State v. Kramer*, No. C5-00-1195, 2001 WL 604955 at *8 (Minn. App. May 25, 2001) (unpublished opinion). See, also, *State v. Sawyer*, 561 So. 2d 278 (Fla. App. 1990).

[105] See, e.g., *State v. Astello*, *supra* note 92; *U.S. v. Thurman*, No. 06-CR-005, 2006 WL 1049541 (E.D. Wis. Apr. 18, 2006) (unpublished opinion).

implicitly acknowledged that Rogers intended to stop talking. But Wheeler's training, by her own admission, had apparently not informed her that a suspect's statements, such as "I'm done" and "I'm not talking no more," should be scrupulously honored. So, Wheeler pressed on, and was eventually able to extract a confession.

[15] The State's reliance on *State v. Thomas*,[106] as support for its argument that Rogers' statements were not a clear invocation, is misplaced. Not only was Thomas' statement internally inconsistent with the alleged invocation, as already discussed, but the context of his statement was also different. Thomas, already a convicted felon, said that he was "done talkin[g]" in the midst of an argumentative dialog in which he appeared to be seeking information about what the police already knew and the probable consequences of his acts if he confessed. In this case, despite the fact that Rogers was visibly intimidated and had no prior experience with the justice system, Rogers made not one, but two clear requests that the questioning cease. There were no internal inconsistencies to these requests, and as already mentioned, unlike Thomas, Rogers did not casually continue dialog or seek additional information, but ceased for a long time to speak at all. A suspect is not required to use special or ritualistic phrases to invoke the right to remain silent, and a reasonable police officer should have understood that Rogers was invoking her right to remain silent.[107] We find, considering all the surrounding circumstances of the statements in issue, that Rogers effectively invoked her Fifth Amendment rights.

Scrupulously Honor

[16] It is the mandate of the U.S. Supreme Court that the protections of *Miranda* be strictly adhered to when a suspect is subjected to the inherently coercive environment of modern custodial interrogations. The techniques common to such interrogations are not per se prohibited, but suspects must

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[106] *State v. Thomas*, *supra* note 5.

[107] See, *Davis v. United States*, *supra* note 37; *People v. Arroya*, *supra* note 71.

be protected from the coercion of these techniques by being advised of their *Miranda* rights and by the scrupulous honoring of those rights if they are invoked. The U.S. Supreme Court has made it clear that the police do not "scrupulously honor" a suspect's invocation of the right to remain silent when they press on with little or no cessation in the interrogation.[108] The Court prohibits officers from simply persisting in repeated efforts to wear down the suspect's resistance and change his or her mind about the invocation.[109] But that is exactly what happened here. Thus, Rogers' invocation of her right to remain silent was not scrupulously honored.

Harmless Error

[17] We therefore conclude that it was error for the trial court to deny Rogers' motion to suppress and to admit the confession that was taken in violation of Rogers' *Miranda* rights. Still, even a constitutional error does not automatically require reversal of the conviction if that error is a "'trial error'" and not a "structural defect."[110] As the U.S. Supreme Court has noted, the admission of an improperly obtained confession is a "trial error," and thus, its erroneous admission is subject to the same "harmless error" standard as other trial errors.[111] We consider whether the admission of Rogers' confession was harmless error.

[18] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[112]

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[108] *Michigan v. Mosley, supra* note 35.

[109] *Id.*

[110] See *Arizona v. Fulminante, supra* note 8, 499 U.S. at 310.

[111] *Id.*; *Milton v. Wainwright*, 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972).

[112] See, *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

There was substantial circumstantial evidence incriminating Rogers in this case that may well have been sufficient, without the confession, to sustain a conviction. But we cannot conclude, on our review of the record, that such evidence was so overwhelming that the verdict was surely unattributable to the erroneous admission of Rogers' confession.[113] We cannot find the admission of Rogers' confession to be "harmless," and we therefore find that the judgment should be reversed.

Double Jeopardy

[19] Having found reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Rogers' conviction. If it was not, then concepts of double jeopardy would not allow a remand for a new trial.[114] The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[115] We find that Rogers' confession and the circumstantial evidence against her were sufficient to sustain the verdict. We therefore reverse the conviction and remand the cause for a new trial.

Remaining Assignments of Error

[20] In her remaining assignments of error, Rogers contends that the district court erred in imposing an excessive sentence and in overruling her motion to declare that the mandatory minimum sentence of 20 years for child abuse resulting in death is unconstitutional, because it violates the Equal Protection Clause and the Separation of Powers Clause. Because we have determined that the district court committed reversible error by admitting statements made by Rogers after her invocation of her right to remain silent, we do not address these assignments of error. An appellate court is not obligated

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[113] See, *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); *Payne v. Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958); *State v. Leger*, 936 So. 2d 108 (La. 2006); *Commonwealth v. Hosey*, 368 Mass. 571, 334 N.E.2d 44 (1975).

[114] See, e.g., *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[115] *Id.*

to engage in an analysis that is not needed to adjudicate the controversy before it.[116]

CONCLUSION

For the reasons discussed, we conclude that the district court erred in denying Rogers' motion to suppress to the extent that the court admitted statements made by Rogers after she unambiguously invoked her right to remain silent. Because the evidence presented by the State was sufficient to sustain Rogers' conviction, we reverse the conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[116] *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

GERRARD, J., concurring.

April Rogers was asked to come to the sheriff's office for interrogation, where she was placed in a small room and relentlessly questioned by two officers for over 2 hours. Yet, the dissenting justices would find that she was not in police custody. And before Rogers broke down under interrogation, she told the officers that she was "done" and "not talking no more." But one of the dissenting judges believes she did not invoke her right to remain silent. The fact of the matter is that when Rogers said she was done talking, the law required the officers to stop questioning her. The U.S. Supreme Court has been quite clear on that point, and we are not at liberty to disagree. Therefore, I join the majority's opinion concluding that Rogers' statement to officers should not have been admitted into evidence. And for these further reasons, I concur.

STANDARD OF REVIEW

The first dissenting opinion begins by questioning our standard of review. But the dissent's criticism reads too much into our decisions in *State v. Thomas*[1] and *State v. Mata*.[2] The standard of review for a mixed question of law and fact, as

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[1] *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

[2] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

explained in our opinion, is to review the trial court's factual findings for clear error, but whether those facts meet constitutional standards is a question of law.[3] Although *Thomas* and *Mata* did not clearly articulate that distinction, they do not demand the interpretation given them by the dissenting opinion.

And the dissent's criticism of this two-pronged standard of review fails to account for its flexibility. The dissent suggests that the trial court, with the benefit of live testimony, is in a better position to make an invocation inquiry. But live testimony is uniquely helpful only in making factual determinations, on which we properly defer to the trial court's conclusions. Live testimony does nothing to illuminate a court's evaluation of what the federal Constitution requires.

Even more problematic is the dissent's suggestion that we should "reserve action" on articulating our standard of review, because the parties neither briefed nor argued it. That assertion is not correct. Both parties, in their briefs, set forth the propositions of law they believed relevant to the standard of review for Rogers' motion to suppress her statement.[4] And the standard of review set forth in the State's brief is not the one endorsed by the dissenting opinion—it is the one set forth in the majority opinion.[5] In any event, the parties properly addressed the standard of review and the majority opinion correctly articulated and applied it.

INVOCATION OF RIGHT TO REMAIN SILENT

The first dissent begins its discussion of invocation by misapprehending our decision in *Mata*.[6] The language relied upon by the dissent as being ambiguous—"'I will plead the fifth right now'"—*was held* to clearly invoke the Fifth Amendment

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[3] See, e.g., *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).

[4] See, brief for appellant at 3; brief for appellee at 7.

[5] See brief for appellee at 7.

[6] *Mata*, *supra* note 2.

rights of the defendant in *Mata*, and his statements after that point were suppressed.[7]

But more generally, the dissent oversimplifies this analysis by focusing almost exclusively on the exact words spoken by the suspect, rather than considering the context and manner in which they were used. And I am not persuaded by the dissent's suggestion that we should rely only on Nebraska cases. This is a question of federal constitutional law, on which other state and federal courts have at least equal experience, in which more factually comparable cases have arisen, and the decisions of which are particularly helpful because they provide a more comprehensive discussion of context than our decisions to this point have required.

Nor am I persuaded by the dissent's exhaustive parsing of *Thomas*.[8] Despite the dissent's attempts to find deeper meaning in it, *Thomas* was really a very simple case, in which we relied on the ambiguity of the suspect's uninterrupted statement. The defendant in *Thomas*, Kevin L. Thomas, never clearly sought to invoke his right to remain silent.

> Instead, he interrupted an accusation that he had committed the crime by stating, "I'm done talkin' man, I know what I did, how can ya'll keep on saying I did it." After this, Thomas continued to converse with the officers. Thomas' single statement that he was done talking could be interpreted as a response in frustration to the investigators' unwillingness to believe that he was not involved in the crime instead of a clear invocation of his right to remain silent. Thomas also followed the statement by a question requesting further information, which also acted to encourage further dialog. This single statement was not a clearly stated intent to end the interview. Had he wanted to terminate the interview, he could have made his wishes clear.[9]

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[7] See *id.* at 680, 668 N.W.2d at 464.

[8] *Thomas*, *supra* note 1.

[9] *Id.* at 350, 673 N.W.2d at 908.

The majority opinion persuasively explains why the circumstances of *Thomas* are distinguishable from this case. And the dissent is attacking a straw man in discussing whether the criminal histories of Thomas and Rogers are relevant. Contrary to the dissent's suggestion, our analysis in this case does not turn on that fact. Our opinion in *Thomas* set forth lengthy quotations from the police interview of Thomas. It is difficult to characterize the cat-and-mouse aspects of those colloquies without noting that Thomas' strategy was informed by his experience. But that simply describes the interviews to benefit the reader who has not seen the evidence. Our opinion in this case plainly concludes that Rogers' words were unambiguous, just as Thomas' were not, and Rogers' relative lack of a criminal history is not essential to that analysis.

CUSTODY

On the custody issue, the first dissent primarily relies on oversimplifying the rubric to be applied to such questions. While a categorical examination of factors to be considered can be helpful, the dissent's attempts to reduce it to a mathematical inquiry take the phrase "totality of the circumstances" far too literally. Although it reaches a different conclusion on this issue, the second dissenting opinion persuasively explains why our analysis should be broader than the six factors in *U.S. v. Axsom*[10] when more complicated circumstances warrant it, as these do.

Nor am I persuaded by the first dissent's almost exclusive reliance on *Yarborough v. Alvarado*.[11] The dissent attempts to sidestep the most pertinent distinction between *Alvarado* and the present case—the issue in *Alvarado* was *not* whether the suspect was in custody when he confessed. Rather, the issue was whether a California state court's decision was clearly unreasonable pursuant to the Antiterrorism and Effective Death Penalty Act of 1996.[12] In such a case, as the Court clearly

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[10] See *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

[11] *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004).

[12] 28 U.S.C. §§ 2241 to 2255 (2000).

explained, "[w]e cannot grant relief under [the act] by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter."[13] Because, on the facts presented, "fairminded jurists could disagree over whether [the suspect] was in custody," the Court concluded that the California court's finding was not unreasonable.[14] The Court never decided the issue we must decide in this case, and the Court's conclusion on a different issue is not determinative here.

Both dissenting opinions fail to engage the significant weight of authority discussed in the majority opinion. And both reach for an issue, custody, that was not contested by the State at any point in this case before filing supplemental briefs in this court—perhaps because everyone involved at the trial level seemed to assume that Rogers was in custody. And that was a reasonable assumption. The isolated facts relied upon by the dissenters are simply not compelling when placed in context. I am not persuaded by the dissenters' suggestion that telling Rogers that she was not locked in the interrogation room is equivalent to telling a suspect that he or she is free to end the interrogation and go home.[15] And the fact that Rogers "voluntarily" reported to the sheriff's office is not convincing, because Rogers had to know she did not have much of a choice. She was the sole adult in a house where a mortally injured 6-month-old was found. Any reasonable person in that situation would expect to be a suspect and would not expect the sheriff's officers to just go away if she refused to cooperate. I agree that this fact is part of our analysis, but it does not deserve particular weight, and certainly does not outweigh the length and intensity of the interrogation in this case.

CONCLUSION

The bottom line is that, having viewed the videotaped interrogation, it is apparent to me that Rogers was in custody and that she tried to invoke her right to remain silent, only to have

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[13] *Alvarado, supra* note 11, 541 U.S. at 665 (emphasis in original).

[14] *Id.*, 541 U.S. at 664.

[15] Compare *Mata, supra* note 2.

it ignored by her interrogators. I recognize that circumstances such as this can motivate sheriff's officers to assertively pursue a confession in order to expeditiously solve a crime. But regardless what type of crime is committed, the officers are equally bound to carefully follow the law. Here, they did not. They made a mistake. And the trial court relied on the results of that mistake when it admitted into evidence statements made by Rogers after she had unambiguously invoked her right to remain silent. We are dutybound, by the U.S. Constitution and the decisions of the U.S. Supreme Court, to order a new trial.

CONNOLLY and STEPHAN, JJ., join in this concurrence.

HEAVICAN, C.J., dissenting.

I respectfully dissent from the majority's conclusion that Rogers' confession must be suppressed. In my view, Rogers not only failed to unequivocally invoke her Fifth Amendment right to remain silent but, in fact, she had no such right to invoke, as she was not in custody when officers interviewed her.

I.

Before proceeding to a discussion of whether Rogers was in custody when she confessed, I want to first express my concerns with the majority's discussion of whether Rogers unequivocally invoked the right to remain silent. I have two concerns in this regard.

A.

My first concern is with the standard of review the majority proposes we apply to determine "whether there has been an unambiguous invocation of the right to remain silent or to have counsel."

In *State v. Mata*,[1] we resolved some confusion regarding the proper standard of review when determining whether a suspect was in custody for *Miranda* purposes. We held that "findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error" but that the ultimate

[1] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

determination of whether, under those facts, "a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave is reviewed de novo."[2] In that same opinion, however, we left no doubt that "[r]esolution of ambiguity in the invocation of the constitutional right to remain silent is a question of fact" and that a district court's conclusion on that issue would not be disturbed unless it was "clearly erroneous."[3] We recently reaffirmed that standard of review in *State v. Thomas*.[4]

Today, the majority jettisons the standard we used in *Mata* and *Thomas* on the *invocation* issue in favor of the two-part standard of review we used in *Mata* on the *custody* issue. I am not convinced that we should be so quick to discard *Mata* and *Thomas* on that point.

For one, this is not as straightforward a question as the majority's conclusion might suggest. Indeed, the standard of review to apply on the invocation matter is one on which even federal courts of appeal disagree.[5] And I can think of at least one legitimate reason why they might: A de novo standard of review makes sense in the custody context, because a custody determination is made on the basis of facts that are less susceptible to misinterpretation on review. A transcript of trial testimony will normally accurately reveal whether a suspect arrived at the station of his or her own accord; was advised that he or she was not under arrest; was handcuffed, locked in a room, or told to remain in place; or other factors indicative of custody.[6]

But as the majority itself acknowledges, resolving the ambiguity inherent in a suspect's attempted invocation of the right to silence (or to an attorney) depends heavily on matters of

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[2] *Id.* at 679, 668 N.W.2d at 464.

[3] *Id.* at 684, 668 N.W.2d at 467.

[4] *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004).

[5] See, e.g., *U.S. v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008) (de novo); *U.S. v. Uribe-Galindo*, 990 F.2d 522 (10th Cir. 1993) (same). But see, *U.S. v. Ferrer-Montoya*, 483 F.3d 565 (8th Cir. 2007) (clearly erroneous); *Goodwin v. Johnson*, 224 F.3d 450 (5th Cir. 2000) (same).

[6] See *Mata*, *supra* note 1.

context. The suspect's vocal intonation, gestures, or other indicia of emphasis may prove decisive in the invocation inquiry. Yet, these are precisely the sorts of things that a trial court, which has the benefit of live testimony to help bring texture to the police-suspect encounter, is in a better position to determine relative to appellate judges, for whom a cold transcript may be the only glimpse into how the statement in question was presented.

To be sure, as this case shows, some cases will feature a recording of the encounter. In such instances, a trial court has less of an advantage in resolving the invocation issue. But the majority's proposed standard of review makes less sense in cases where no video or audio recording of the interview exists. A de novo standard of review in those cases may increase the likelihood of an inaccurate determination.

There may be other reasons to avoid adopting a de novo standard of review on the invocation issue. But we may never know, because this is an issue that neither party addressed in its briefs to this court. Indeed, Rogers herself assumed that the clearly erroneous standard of review we used in *Mata* and *Thomas* still applied to our review of Rogers' attempted invocation of the right to silence. In view of the fact that accurate judicial decisionmaking depends on a vigorous defense and prosecution of the issues involved,[7] I think it would be unwise to unilaterally reach out and resolve this vexing and fundamental issue without the benefit of briefing and argument by counsel. I would, therefore, reserve action on this issue for a day when the advice of counsel will allow us to make a more fully informed decision.

B.

I now turn to whether Rogers successfully invoked her Fifth Amendment right to remain silent. At issue is whether Rogers' statements, "I'm done" and "I'm not talking no more" were sufficiently unequivocal to trigger Rogers' right to silence. We

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[7] See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (Souter, J., concurring).

have considered this issue twice in the last 5 years with regard to very similar statements.

In *Mata*, this court was asked to consider whether statements made by the defendant that he did not "'want to answer no more questions'" and "'I will plead the fifth right now'" were sufficiently unequivocal to invoke the right to remain silent.[8] We held that when "taken in context," those statements "can be read as frustration with particular questions rather than clearly stated intent to end the interview."[9]

In *Thomas*, this court considered whether Kevin L. Thomas invoked the right to silence when he said, "'I'm done talkin' man,'" during a custodial interrogation.[10] Once again, we held that this statement was more indicative of Thomas' frustration with the officers' questions than "a clear invocation of his right to remain silent."[11]

The language at issue in *Mata* and *Thomas* is virtually identical to the language Rogers used here. The statement that the defendant did not "'want to answer no more questions'" from *Mata* bears a striking resemblance to Rogers' statement "I'm not talking no more," and is far less equivocal than Rogers' bald assertion, "I'm done." Thomas' statement "'I'm done talkin' man,'" is almost a perfect amalgam of Rogers' statements, "I'm done" and "I'm not talking no more." If this language did not trigger the right to remain silent in *Mata* or *Thomas*, I fail to see why it does now.

Given the high degree of similarity between the language in those cases and in this case, I question the majority's failure to discuss *Mata* at all, and only briefly examine *Thomas*. Instead, the majority relies primarily on cases from a number of jurisdictions outside of Nebraska. While the desire to derive additional insight from other jurisdictions is commendable, we should not rely on such authority in place of our own.

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[8] *Mata, supra* note 1, 266 Neb. at 680, 668 N.W.2d at 464.

[9] *Id.* at 684, 668 N.W.2d at 467.

[10] *Thomas, supra* note 4, 267 Neb. at 350, 673 N.W.2d at 908.

[11] *Id.*

The majority attempts to distinguish *Thomas* on the basis that the alleged invocation of the right to silence was followed by a question which cast doubt on Thomas' desire to terminate questioning. But our determination that Thomas had not unequivocally invoked his right to remain silent was primarily based on the fact that "Thomas' *single statement that he was done talking* could be interpreted as a response in frustration to the investigators' unwillingness to believe that [Thomas] was not involved in the crime . . . ."[12]

Only *after* coming to that conclusion did we note that "Thomas *also* followed the statement by a question requesting further information . . . ."[13] We regarded that followup question—"'[H]ow can ya'll keep on saying I did it[?]'"—as a move which, like the assertion itself that he was done talking, "*also* acted to encourage further dialog" between Thomas and the officers.[14] In other words, Thomas' followup question provided an alternative reason to find that Thomas had not invoked his right to remain silent in addition to the ambiguity inherent in Thomas' initial statement.

Nor, it seems to me, is Thomas' experience as a felon a sufficient reason to distinguish that case from this one. The majority informs us that at the time of his interview, Thomas was "already a convicted felon," whereas Rogers "had no prior experience with the justice system." With these comments, the majority seems to imply—without citing any supporting authority—that a statement too ambiguous to trigger the right to remain silent for a veteran criminal like Thomas may suffice to invoke the right to remain silent for a suspect with comparatively less criminal experience like Rogers.

But our conclusion that Thomas did not unequivocally invoke his right to remain silent was not made with reference to his experience as a criminal. We simply held that "[h]ad [Thomas] wished to terminate the interview, he could have made his

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[12] *Id.* (emphasis supplied).

[13] *Id.* (emphasis supplied).

[14] *Id.* (emphasis supplied).

wishes clear."[15] Of course, the same could be said about *any* suspect who failed to unambiguously invoke his or her right to remain silent.

Moreover, taking Rogers' lack of experience with the criminal justice system into account improperly injects a subjective element into the *Miranda* inquiry. "To avoid difficulties of proof and to provide guidance to officers conducting interrogations," the inquiry into whether a suspect actually invoked his or her *Miranda* rights "is an objective [one]."[16] And the U.S. Supreme Court has made clear that "a suspect's experience with law enforcement" has no place in an objective inquiry.[17]

Thus, the question is not whether, in light of his or her experience, the suspect could have more clearly articulated his or her desire to terminate questioning. Rather, the question is whether the *words themselves* would have led a reasonable officer to conclude that the suspect wanted to cease the interview.[18] By taking Rogers' lack of criminal justice experience into account, the majority undermines the chief advantage of *Miranda* by "'plac[ing] upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.'"[19]

Context does not help distinguish *Thomas* either. The context surrounding Thomas' statement further confirms that Rogers did not unequivocally invoke her right to remain silent under our existing precedent. In *Thomas*, we noted that his alleged invocation of the right to remain silent came after investigators repeatedly refused to believe that Thomas was not involved in the crime. This led us to conclude that Thomas' statement

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[15] *Id.*

[16] *Davis v. United States*, 512 U.S. 452, 458-59, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

[17] *Yarborough v. Alvarado*, 541 U.S. 652, 667, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004).

[18] See *Davis*, *supra* note 16.

[19] *Berkemer v. McCarty*, 468 U.S. 420, 442 n.35, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984), quoting *People v. Rodney P. (Anonymous)*, 21 N.Y.2d 1, 233 N.E.2d 255, 286 N.Y.S.2d 225 (1967).

reflected frustration with his inability to convince officers he was telling the truth rather than a desire to terminate questioning.[20] The same conclusion is warranted here.

Like *Thomas*, Rogers' statements also came after officers repeatedly refused to accept her explanation of how Alex, the child victim, sustained his injuries. The statements were not accompanied by any abrupt gestures, vocal intonation, or anything else that might indicate a firm intent to cut off questioning. Instead, everything about Rogers' tone, brusque responses, and body language suggests that her statements reflect nothing more than irritation with Officer Brenda Wheeler's persistence in making accusations that Rogers had already denied. This is a fact pattern that more closely matches our description of what occurred in *Thomas*.

In sum, we cannot ignore *Mata* and *Thomas* in favor of authority chosen from other jurisdictions. So long as *Mata* and *Thomas* remain good law, Rogers' statements fell short of "a clearly stated intent to end the interview."[21] This is particularly so if we use the "clearly erroneous" standard of review employed in those two decisions to measure the district court's findings on ambiguity in the invocation of the constitutional right to remain silent.

II.

The fact that Rogers did not unequivocally invoke her right to remain silent is, in and of itself, reason enough to affirm the trial court's opinion. But the fact that Rogers' "alleged invocation of the Fifth Amendment was not made in the context of a custodial interrogation" provides an additional reason to affirm the trial court's decision.[22] Although this is a closer question than those presented in our recent cases, controlling precedent nonetheless compels the conclusion that Rogers was not in custody when she was interviewed by authorities on December 7, 2005.

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[20] *Thomas*, *supra* note 4.

[21] See *id.*

[22] *Mata*, *supra* note 1, 266 Neb. at 684, 668 N.W.2d at 467.

A.

At the beginning of its analysis, the majority refers to the six-factor custody inquiry used by the Eighth Circuit in, among other decisions, *U.S. v. Axsom*.[23] We formally adopted the *Axsom* analysis in *Mata*[24] and applied it again in *State v. McKinney*.[25] To say, however, that we have merely found those six indicia "helpful" in our custody analysis is an understatement.

In *Mata*, for example, our custody inquiry was based solely on a factor-by-factor analysis of the six *Axsom* indicia. In *McKinney*, decided in 2007, our custody inquiry once again consisted entirely of a factor-by-factor analysis under *Axsom*. These cases suggest that the *Axsom* factors are not just "helpful" in the custody determination; they are significantly outcome determinative. Indeed, one might even say that although the *Axsom* factors are not dispositive, they have, at the very least, "been influential in this court's assessment of the totality of the circumstances surrounding an official interrogation."[26]

As set forth in *Axsom* itself and reemphasized in both *Mata* and *McKinney*, the six *Axsom* indicia are divided into three mitigating and three aggravating factors.[27] The presence of a mitigating factor weighs against a finding that the encounter was custodial in nature, while the presence of an aggravating factor increases the likelihood that a reasonable person would consider themselves in custody.[28] Although the final tally is close, a fair application of the six *Axsom* factors suggests that Rogers' encounter with law enforcement was noncustodial in nature.

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[23] *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

[24] *Mata*, *supra* note 1.

[25] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

[26] See *U.S. v. Griffin*, 922 F.2d 1343, 1349 (8th Cir. 1990).

[27] See, *Axsom*, *supra* note 23. See, also, *McKinney*, *supra* note 25; *Mata*, *supra* note 1.

[28] See, *Axsom*, *supra* note 23; *McKinney*, *supra* note 25; *Mata*, *supra* note 1.

1.

The first mitigating factor asks "whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to [leave], or that the suspect was not considered under arrest."[29] As the majority correctly notes, we cannot ascertain from this record whether officers ever expressly told Rogers that she was not under arrest. Nor do we know if the officers expressly indicated that Rogers was free to leave the sheriff's office. I therefore agree with the majority that the first mitigating factor is not present on this record.

I do think, however, that the record supports the second mitigating factor—"whether the suspect possessed unrestrained freedom of movement during questioning."[30] The majority seems to conclude that Rogers did not have that freedom, based on the fact that Rogers "would have had a hard time even standing up when [Deputy] Wheeler was grasping both of her hands."

The majority refers to an exchange that occurred roughly 1½ hours into questioning. At that point, Rogers began sobbing and announced that Alex sustained his injuries when Rogers fell down the stairs while carrying him. As she made this announcement, Rogers reached for and held Officer Eric Sellers' hands. Wheeler came into the room several minutes later. When she did so, Rogers stood up, held her arms open, hugged Wheeler, and began sobbing. When the two then sat down, they maintained their grip on each others' hands.

The fact that this physical contact was initiated by Rogers herself is significant. Just as a police-suspect encounter is less likely to be custodial when the suspect initiates the meeting,[31] logic suggests that physical contact between an officer and a suspect is less likely to be regarded as a form of restraint if the suspect initiates the contact.

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[29] *McKinney, supra* note 25, 273 Neb. at 364, 730 N.W.2d at 91.

[30] *Id.* at 364-65, 730 N.W.2d at 91.

[31] *Griffin, supra* note 26.

It is equally important to view this contact in its proper context. Actions which may seem indicative of custody in the abstract do not necessarily support a custodial finding when viewed in light of the surrounding circumstances.[32] The contact between Rogers and Wheeler occurred during an emotional point in the interview while Rogers was openly sobbing. This suggests that a reasonable person would have regarded Wheeler's gesture as a reciprocal act of sympathy rather than an act of restraint.

I also question the majority's conclusion that "once the interrogation became more accusatory, Rogers' only exit from the room was continuously blocked by either Sellers or Wheeler sitting very close, knee to knee, in front of her." The position of the video camera in the interview room is such that the parties appear in the very bottom of the frame. This makes it impossible to determine how much space existed between the wall nearest the camera and the chairs where Rogers and the officers were sitting. It is impossible to say, therefore, how much of an egress was left open between that wall and the officers for Rogers to pass through. Accordingly, any assertion that Rogers' path was "blocked" is simply a guess.

Nor is it significant that officers questioned Rogers face-to-face and were seated between her and the door. These facts may have curtailed Rogers' freedom of movement relative to, say, a police-suspect encounter in the public square.[33] But the question is not whether Rogers' freedom of action was limited; the question is whether Rogers' freedom of action was limited "'in any *significant* way.'"[34] Compared to a persistent police escort, physical act of genuine restraint, or verbal command to remain in a particular place,[35] questioning a suspect face-to-face while positioned between the suspect and the door is an

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[32] See, e.g., *Davis v. Allsbrooks*, 778 F.2d 168 (4th Cir. 1985).

[33] See, e.g., *Berkemer, supra* note 19.

[34] *Oregon v. Mathiason*, 429 U.S. 492, 494, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977) (per curiam) (emphasis supplied), quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[35] See *Griffin, supra* note 26.

ambiguous act that does not necessarily preclude free movement. It cannot necessarily be said, then, that Rogers was "significantly deprived of [her] freedom of action."[36]

Far from being restrained, the record actually supports the conclusion that Rogers was free to move in and out of the interview room as she chose. As Sellers got up to leave the interview room on one occasion, he paused to note that Rogers may have to let him back in, because the room locked to the outside and he did not have a key. But Sellers informed Rogers that she was neither locked in the room nor expected to remain inside when he immediately added, "So you can get out if you need to."

A suspect's latitude to move out of an interview room at his or her will is "clearly inconsistent with custodial interrogation."[37] Indeed, our decision that officers did not restrain the suspect's freedom of movement in *Mata* was based on our conclusion that "the door to the interview room was left unlocked and that [an officer] explained to Mata that the door was unlocked and that Mata was free to leave at any time."[38] Accordingly, I believe the second mitigating factor is present on these facts.

There is no real dispute regarding the existence of the third and final mitigating factor, which asks "whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions."[39] It is clear that Rogers voluntarily acquiesced to the interview when, in the majority's words, "Rogers agreed" with the officers' request for an interview and drove with her husband to "the station shortly thereafter."

The majority downplays this fact largely because it was the officers, not Rogers, who suggested the interview. But the third mitigating factor does not express any preference for whether

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[36] See *California v. Beheler*, 463 U.S. 1121, 1123, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983) (per curiam).

[37] *U.S. v. Jorgensen*, 871 F.2d 725, 729 (8th Cir. 1989).

[38] *Mata*, *supra* note 1, 266 Neb. at 680, 668 N.W.2d at 464.

[39] *McKinney*, *supra* note 25, 273 Neb. at 365, 730 N.W.2d at 91.

the suspect volunteered to an interview or simply agreed to do so at the request of authorities.[40] Either contingency operates as a mitigating circumstance under this factor.

Indeed, in both *Mata* and *McKinney*, the suspects were not only asked to come to the police station, they were both *transported there by officers* after they agreed to the interview. But that did not stop us from concluding that "all three mitigating indicia [we]re present" in both cases.[41] Given the fact that Rogers drove to the sheriff's office herself, it is difficult to believe a different conclusion is warranted here.

I therefore believe that the third mitigating factor is also present.

2.

Having determined that two of three possible mitigating factors are present here, the next step is to assess the applicability of *Axsom*'s aggravating factors. Those factors are (1) whether strong-arm tactics or deceptive stratagems were used during questioning, (2) whether the atmosphere of the questioning was police dominated, or (3) whether the suspect was placed under arrest at the termination of the proceeding.

The majority does not comment at length on the first aggravating factor except to note that Sellers "told Rogers, *deceptively*, that Alex was going to be okay, although Sellers knew this to be untrue." (Emphasis supplied.) Sellers' comment may have been inaccurate, but that alone does not indicate the existence of any "deceptive stratagems."[42] Indeed, such ambiguous comments are distinguishable from situations where police attempt to confuse a suspect by confronting the suspect with false evidence of his or her involvement in a crime.[43]

The record also fails to support the existence of strong-arm tactics as that term has been conventionally understood. The

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[40] *Id.* See, also, *Axsom, supra* note 23; *Mata, supra* note 1.

[41] *McKinney, supra* note 25, 273 Neb. at 365, 730 N.W.2d at 92. See, also, *Mata, supra* note 1.

[42] *McKinney, supra* note 25, 273 Neb. at 365, 730 N.W.2d at 91.

[43] *United States v. Dockery*, 736 F.2d 1232 (8th Cir. 1984), noted in *Griffin, supra* note 26.

officers did not, for example, discuss the potential penalty for Rogers' involvement or make threats about possible sanctions if she failed to cooperate with them.[44] I believe, therefore, that the first aggravating factor is not present on these facts.

It is clear, however, that the second aggravating factor—"whether the atmosphere of the questioning was police dominated"[45]—is present here. Rogers was questioned by officers in a closed room at the sheriff's office. In *Mata*, we concluded that when "the interview was conducted at the police station, it is reasonable to conclude that the atmosphere was 'police dominated.'"[46]

Finally, the record does not support the third aggravating factor—"whether the suspect was placed under arrest at the termination of the proceeding."[47] There is no dispute that Rogers was permitted to return home with her husband after she confessed to officers.

The majority acknowledges this fact but attempts to downplay its significance because "a reasonable person in Rogers' position at the time of her confession would not have believed" that she would be released after the interview. Yet the custody determination is based on how a reasonable person in the suspect's position would have perceived his or her degree of freedom during the encounter.

Nevertheless, the fact remains that we have repeatedly relied on this factor without reservation in past cases.[48] More importantly, the U.S. Supreme Court specifically mentioned this factor as one of several that are relevant to the custody determination.[49] It appears, therefore, that no matter how illogical it may be to consider whether a suspect was allowed to return home at the conclusion of questioning, it is a fact that we are

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[44] See, e.g., *U.S. v. Beraun-Panez*, 812 F.2d 578 (9th Cir. 1987).

[45] *McKinney, supra* note 25, 273 Neb. at 365, 730 N.W.2d at 91.

[46] *Mata, supra* note 1, 266 Neb. at 683, 668 N.W.2d at 466.

[47] *McKinney, supra* note 25, 273 Neb. at 365, 730 N.W.2d at 91.

[48] See, *id.*; *Mata, supra* note 1.

[49] See *Yarborough, supra* note 17.

bound to take seriously when resolving whether a suspect was in custody.

Of course, this debate is largely academic. The third aggravating factor is just that—an *aggravating* factor. As such, it only affects the *Axsom* calculus if officers did *not* allow the suspect to go home after his or her interview. Therefore, whether the majority fully acknowledges that Rogers was released or determines "this fact to be of little consequence," it does not change the fact that there are two mitigating factors weighing in favor of a noncustodial encounter, and only one factor weighing against it.

In *Mata* and *McKinney*, the tally was three mitigating factors versus one aggravating factor. The difference in those cases was the existence of explicit statements by officers to each suspect informing them that they were not under arrest. I note, however, that in both cases, such information may have been necessary to clarify the status of suspects who, unlike Rogers, did not come to the station of their own accord.

In *Mata*, the suspect was initially handcuffed and then, after the handcuffs were removed, transported by police to the station house in a police vehicle. Likewise, in *McKinney*, the "[t]wo investigators drove [the suspect] to Nebraska State Patrol offices for an interview."[50] In such a context, advising a suspect that he or she is not under arrest helps mitigate the presumption of arrest that might be formed when the police transport the suspect to the station. But informing a suspect that he or she is not under arrest is somewhat superfluous where, as here, the suspect drove himself or herself to the station.

In any event, this situation presents us with two mitigating factors and just one aggravating factor. So although a noncustodial finding would be more obvious with some concrete proof that officers expressly informed Rogers she was not under arrest, the balancing test used in *Mata* and *McKinney* compels the conclusion that Rogers was not in custody even without such evidence.

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[50] *McKinney, supra* note 25, 273 Neb. at 363, 730 N.W.2d at 90.

B.

As noted above, the custody analyses in *Mata* and *McKinney* were predicated on the *Axsom* factors alone. Nevertheless, in light of the close split in the *Axsom* factors, I do not quarrel with the majority's suggestion that we consider past cases with similar facts for guidance.

The majority cites *State v. Dedrick*,[51] a 19-year-old decision from the New Hampshire Supreme Court. *Dedrick* is similar to this case in many respects and apparently supports the conclusion that Rogers was in custody.

But opinions of other states are not binding on this court, and any number of them may be incorrect interpretations of the Fifth Amendment.[52] *Dedrick* itself illustrates this point by essentially treating its custody determination as a question of fact—not the standard employed by this court (and a standard later rejected by the New Hampshire Supreme Court[53]). Because authority from other, parallel jurisdictions is potentially inaccurate, it would be an exercise in futility to try to match the majority case by case with contradictory precedent from yet another jurisdiction. Instead, resolving this issue of federal constitutional interpretation is perhaps best done by looking to U.S. Supreme Court precedent.

Precedent from the Supreme Court of the United States has two chief advantages over that of the New Hampshire Supreme Court. First, the U.S. Supreme Court's status as the "final arbiter of the United States Constitution"[54] means that its interpretation of the Fifth Amendment is presumptively correct and, therefore, totally reliable. The U.S. Supreme Court's position in our constitutional order also means that we are bound by its precedent. By relying on another state's case in place of U.S. Supreme Court precedent, we not only risk adopting inaccurate law, we may also violate our duty

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[51] *State v. Dedrick*, 132 N.H. 218, 564 A.2d 423 (1989).

[52] See, e.g., *Berkemer, supra* note 19.

[53] *State v. Spencer*, 149 N.H. 622, 826 A.2d 546 (2003).

[54] *Arizona v. Evans*, 514 U.S. 1, 9, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

to obey controlling authority. With that said, I note that *Yarborough v. Alvarado*[55] bears a great resemblance to the facts of this case.

Yarborough featured the interrogation of Michael Alvarado, a 17-year-old suspect in the shooting death of a truckdriver. A month after the shooting, a detective "left word at Alvarado's house and also contacted Alvarado's mother at work with the message that she wished to speak with Alvarado."[56] In response, "Alvarado's parents brought him to the Pico Rivera Sheriff's Station to be interviewed" and "waited in the lobby while Alvarado went . . . to be interviewed."[57]

As was true in this case, the interview itself took place in a "small interview room" and "lasted about two hours."[58] Alvarado initially denied any involvement in the shooting, only to confess after repeated accusations by the interviewing officer. Finally, "Alvarado's father drove him home" when the interview was over.[59]

Alvarado's confession was admitted at trial, and he was subsequently convicted of second degree murder. On direct appeal, the California Court of Appeal affirmed Alvarado's conviction, finding that he was not in custody when he confessed. The California Supreme Court denied Alvarado's request for review. Alvarado then filed a writ for habeas corpus in the U.S. District Court for the Central District of California, which also found that Alvarado was not in custody when he confessed. The Ninth Circuit reversed on appeal, finding that in light of Alvarado's youth and lack of experience, it was "'unreasonable'" to conclude that a person in Alvarado's position would have felt free to leave.[60] The U.S. Supreme Court granted certiorari to resolve the issue of whether the state court's conclusion that Alvarado

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[55] *Yarborough*, *supra* note 17.

[56] *Id.*, 541 U.S. at 656.

[57] *Id.*

[58] *Id.*

[59] *Id.*, 541 U.S. at 658.

[60] *Id.*, 541 U.S. at 660.

was not in custody when he confessed "'involved an unreasonable application' of clearly established law."[61]

In answering that question, the Court began by listing the facts that "weigh against a finding that Alvarado was in custody."[62] Here, the Court noted that "[t]he police did not transport Alvarado to the station or require him to appear at a particular time."[63] Additionally, police did not "threaten [Alvarado] or suggest he would be placed under arrest," but "appealed to his interest in telling the truth and being helpful to a police officer."[64]

The Court also observed that "Alvarado's parents remained in the lobby during the interview, suggesting that the interview would be brief. . . . In fact . . . he and his parents were told that the interview '"was not going to be long."'"[65] On two occasions, the detective "asked Alvarado if he wanted to take a break."[66] Finally, "[a]t the end of the interview, Alvarado went home."[67] The *Yarborough* Court stated that

> these objective facts are consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave. Indeed, a number of the facts echo those of *Mathiason*, a *per curiam* summary reversal in which we found it "clear from these facts" that the suspect was not in custody.[68]

Notably, every single mitigating factor mentioned by the *Yarborough* Court is present here. Officers did not transport Rogers to the station. Instead, they asked her if she would be willing to come in and answer questions, and she came on her own. Nor did officers threaten Rogers. As in *Yarborough*, the officers merely appealed to her interest in helping authorities

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[61] *Id.*, 541 U.S. at 663, quoting 28 U.S.C. § 2254(d)(1) (2000).

[62] *Id.*, 541 U.S. at 664.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*, 541 U.S. at 664-65, quoting *Mathiason*, *supra* note 34.

by asking her to identify the cause of Alex's injuries so doctors could treat him more effectively. Like Alvarado, Rogers also had family (her husband) waiting for her in the lobby of the sheriff's office during questioning. Rogers and her husband were essentially told the interview would be brief and would take only 20 or 30 minutes. Finally, officers did not merely ask Rogers if she needed to take a break; they actually told Rogers she could get out of the interview room if she needed to.

Of course, the *Yarborough* Court also acknowledged that "[o]ther facts point in the opposite direction."[69] Here, the Court noted that Alvarado was "interviewed . . . at the police station" and that "[t]he interview lasted two hours, four times longer than the 30-minute interview in *Mathiason*."[70] Also, unlike the officer in *Mathiason*, the detective "did not tell Alvarado that he was free to leave."[71] Each of these facts, which "weigh in favor of the view that Alvarado was in custody,"[72] are present here as well.

Notably, the *Yarborough* Court's discussion of aggravating factors lacks even a single reference to the fact that the detective repeatedly confronted Alvarado with evidence of his guilt and expressed her belief that Alvarado was guilty of the crime. This is significant, because the majority's conclusion that Rogers was in custody depends largely on the fact that Rogers was "subjected to aggressive accusatorial interrogation in which she was confronted with substantial evidence to prove her guilty of a crime." But by neglecting to list aggressive accusations among the factors indicative of a custodial encounter, *Yarborough* suggests that such confrontations have no bearing on the custody determination.

This point was not lost on the dissenting justices in *Yarborough*. In concluding that Alvarado was in custody, the dissenters, like the majority here, made much of the fact that

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[69] *Id.*, 541 U.S. at 665.

[70] *Id.*

[71] *Id.*

[72] *Id.*

Alvarado was "confronted with claims that there is strong evidence that he participated in a serious crime."[73] But because this proposition appears in the dissent rather than in *Yarborough*'s majority opinion, it appears this view is not the law.

And while all of the aggravating factors in *Yarborough* were also present in this case, *Yarborough* featured several additional indicia of custody that are *not* present here. For example, "Alvarado was brought to the police station by his legal guardians rather than arriving on his own accord, making the extent of his control over his presence unclear."[74] No similar argument can be made with regard to the fact that Rogers, an adult, came to the sheriff's office with her husband.

In addition, in *Yarborough*, there was evidence that "Alvarado's parents asked to be present at the interview but were rebuffed, a fact that—if known to Alvarado—might reasonably have led someone in Alvarado's position to feel more restricted than otherwise."[75] There is no evidence that Rogers' husband made a similar request in this case.

Finally, I think it significant that unlike Alvarado, Rogers had been to the sheriff's office for a similar interview the day before. Rogers came to the office for an interview on December 6, 2005, and was allowed to return home afterward. The fact that she emerged unscathed from questioning in a police-dominated atmosphere on December 6 would have given a reasonable person in her position much less reason to regard that same atmosphere as an indication of custody during her interview the following day on December 7.

The only other pertinent difference between this case and *Yarborough* is that Alvarado was questioned by a lone officer, while Rogers was questioned by two officers interchangeably and, at times, simultaneously. But the *Yarborough* Court did not specifically refer to the fact that Alvarado was questioned by a lone officer when it recounted the various facts that "weigh

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[73] *Id.*, 541 U.S. at 671 (Breyer, J., dissenting; Stevens, Souter, and Ginsberg, JJ., join).

[74] *Id.*, 541 U.S. at 665.

[75] *Id.*

against a finding that Alvarado was in custody."[76] Moreover, the U.S. Supreme Court has seemed to equate encounters that involve "only one or . . . two policemen."[77] Finally, the fact that questioning was conducted by more than one officer was not mentioned as an aggravating factor in either *Mata* or *McKinney*. All of this supports the notion that the mere presence of a second officer does not help transform an otherwise noncustodial interrogation into a custodial one.

Ultimately, the *Yarborough* Court never held one way or another whether Alvarado was in custody. Because "fair-minded jurists could disagree over whether Alvarado was in custody,"[78] the Court concluded that the state court's determination that Alvarado was not in custody when he confessed "was [a] reasonable" one.[79] I perceive this comment to mean that the custody determination could have gone either way in *Yarborough*.

But, again, the scales are not as balanced here. While all of the mitigating factors present in *Yarborough* exist in this case, *Yarborough* bore a number of additional indicia of custody that are not present on this record. As a result, the circumstances here provide more support for the conclusion that Rogers' encounter with law enforcement was noncustodial in nature. A comparison with *Yarborough* therefore confirms what *Axsom*'s balancing test suggested by a 2-to-1 margin—that Rogers was not in custody when she confessed to officers on December 7, 2005.

III.

As noted at the outset, this is a close case. Nonetheless, the circumstances compel the conclusion that Rogers not only failed to adequately invoke her Fifth Amendment right to remain silent, she never had that right to begin with, because she was not in custody. Any contrary determination is at odds

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[76] *Id.*, 541 U.S. at 664.

[77] *Berkemer, supra* note 19, 468 U.S. at 438.

[78] *Yarborough, supra* note 17, 541 U.S. at 664.

[79] *Id.*, 541 U.S. at 665.

with recent precedent from this court and ignores the lessons implicit in controlling authority from the Supreme Court of the United States. On the basis of that authority, I must conclude that Rogers' Fifth Amendment rights were not violated when her confession was offered at trial. I would therefore affirm Rogers' conviction.

MILLER-LERMAN, J., dissenting.

I respectfully dissent from the majority's conclusion that Rogers' confession must be suppressed. I write separately to state that upon review of the proper range of factors and the applicable law, I conclude that Rogers' confession did not take place during a "custodial interrogation." As a result, it need not be suppressed, and because the statement is not the product of a custodial interrogation, an exposition under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), on whether Rogers invoked her right to remain silent is not necessary to the resolution of this case.

We have repeatedly observed as a general matter that warnings under *Miranda* are required only where there has been a restriction on one's freedom as to render one "in custody." *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003); *State v. Brouillette*, 265 Neb. 214, 655 N.W.2d 876 (2003). The U.S. Supreme Court has stated:

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

(Emphasis in original.) *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). Further, we have noted that *Miranda* rights cannot be invoked outside the context of custodial interrogation. *State v. Mata*, *supra*. Given the foregoing, it is unavoidable that the issue of whether an individual is in custody be resolved prior to considering whether the police are under an obligation to honor an invocation of *Miranda* rights.

The record admittedly fails to show an indepth analysis of the custody issue at the trial level. Nevertheless, the trial court's order states that "the statements of [Rogers] both while not in custody and while in custody were freely and voluntarily made." From this, I believe that the trial court considered and ruled on whether Rogers was in custody and that therefore, such ruling is subject to review on appeal. I further note that subsequent to oral argument of this case, in a supplemental briefing order filed by this court, the parties were directed to file supplemental briefs addressing the issues of Rogers' custody and invocation of her Fifth Amendment rights. The parties filed their supplemental briefs, thus squarely framing the issue of custody for resolution by this court.

Like the majority and the preceding separate dissent, I have considered the custody inquiry under the six factors listed in *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002), which we applied in *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), and *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007). Because I agree with the majority that the *Axsom* factors are "helpful to our analysis" rather than "significantly outcome determinative" as asserted in the preceding dissent, I have also considered other custody-related jurisprudence.

The *Axsom* factors were derived from *U.S. v. Griffin*, 922 F.2d 1343 (8th Cir. 1990). *Griffin* makes clear that the six factors are "merely intended to be representative of those indicia of custody most frequently cited by this and other courts when undergoing the prescribed totality of the circumstances analysis." 922 F.2d at 1349. The list is "decidedly non-exhaustive," and "a particularly strong showing with respect to one factor" may be influential to the custody analysis. *Id.*

In determining whether an individual is "in custody" at a particular time, the reviewing court must examine the extent of the physical or psychological restraints placed on the individual during questioning in light of whether a "reasonable [person] in the suspect's position would have understood his [or her] situation" to be one of custody. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). I have therefore considered whether a person in Rogers' situation would have believed his or her freedom of action had been curtailed to "the degree associated with a formal arrest," *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983), and whether that belief was reasonable from an objective viewpoint. See, also, *Mata, supra*. In this regard, I have examined the circumstances surrounding the interrogation and whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave. *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

I will not repeat here either the majority's or the preceding dissent's mathematical inventory of the six separate indicators in *Axsom*, nor will I repeat here an architectural description of the interview room which has been amply provided. The majority and the preceding dissent appear to agree that two of the six factors in *Axsom* favor a finding that Rogers was not in custody: i.e., Rogers voluntarily acquiesced to official requests to respond to questioning and Rogers was not arrested at the termination of the proceeding. The majority, however, downplays the significance of both factors. The preceding dissent finds that an additional two factors indicate that Rogers was not in custody, including the determination with which I agree that Rogers had unrestrained freedom of movement. For completeness, I note that the majority and preceding dissent appear to agree that two of the six factors favor a finding that Rogers was in custody.

With respect to voluntarily acquiescing to questioning, I find it important that Rogers agreed to the request for an interview and drove with her husband to the sheriff's office for that purpose and possibly a polygraph examination which was suggested by her husband. Rogers had been to the sheriff's

office for questioning once before and was not detained. I compare this relative lack of coercion to other defendants who were initially handcuffed and interviewed, but who, under the overall circumstances, we nevertheless determined were not in custody. E.g., *Mata, supra*.

With respect to the fact that Rogers was not arrested at the end of the proceeding, contrary to the majority view which found this noncustodial fact to be of "little consequence," I find it revealing, because it reflects and is consistent with a strong showing of a noncustodial event. In this regard, I note that it is well settled that an interrogation which occurs at the police station or jailhouse is not necessarily custodial. *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977). See *U.S. v. Jorgensen*, 871 F.2d 725 (8th Cir. 1989) (suspect not in custody when questioned at Federal Bureau of Investigation offices).

In assessing the totality of the interview, as compared to the majority opinion, I find it particularly significant that when sheriff's officer Eric Sellers left the room, he explained to Rogers that the door was not locked on the inside and stated that "you can get out if you need to." Although this statement does not explicitly state that Rogers was free to leave, it nonetheless signals two important facts: (1) The door was not locked on the inside and (2) Rogers' movement was not restrained. I believe this statement combined with other noncustodial factors leads to the conclusion that a reasonable person in Rogers' situation would not have believed her freedom was curtailed to the degree associated with a formal arrest and that therefore, the interview was not custodial in nature. Because Rogers' confession was not obtained in a "custodial interrogation," it need not be suppressed. I would affirm.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEFFREY L. ORR, RESPONDENT.

759 N.W.2d 702

Filed January 30, 2009. No. S-07-911.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, the Nebraska Supreme Court may, in its discretion, consider the referee's findings final and conclusive.
5. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
7. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
8. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.
9. ____. The purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.
10. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Rules of Professional Conduct are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.
11. **Attorneys at Law.** It is inexcusable for an attorney to attempt any legal procedure without ascertaining the law governing that procedure.

Original action. Judgment of public reprimand.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Mark A. Christensen and Brandon K. Dickerson, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for respondent.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

Jeffrey L. Orr, respondent in this attorney disciplinary proceeding, was found to have violated his oath of office as an attorney and to have violated disciplinary rules requiring an attorney to competently represent a client. The only issue presented is the appropriate sanction to be imposed.

FACTS

The underlying conduct in this case involves Orr's representation of Steve Sickler and Cathy Mettenbrink in connection with the franchising of a coffee shop business. Sickler and Mettenbrink had opened their first coffee shop together, Barista's Daily Grind (Barista's), in Kearney, Nebraska, in December 2001. In September 2002, Sickler met with Orr and asked whether Orr could help Sickler and Mettenbrink franchise their business.

Orr was engaged in private practice in Kearney, and his experience with franchising was limited. Orr testified that he had read franchise agreements on behalf of clients who either were or were interested in becoming franchisees, but had never represented a franchisor. Orr's role in those cases had been to generally advise clients as to the rights of a franchisor and duties of a franchisee under the agreement. Orr's experience had required him to review franchise agreements and disclosure statements, but he had not reviewed state or federal law governing franchising.

In response to Sickler's inquiry, Orr stated that he had recently reviewed a franchisee's agreement and that he believed he could "handle" the franchising of Barista's. Orr told Sickler and Mettenbrink that he would begin working on a franchise agreement, and he completed the first draft in October 2002. Orr stated that he had recently reviewed a restaurant franchise agreement and then utilized that document when drafting the Barista's document. Although he had never before drafted a franchise agreement, Orr believed it was simply "a matter of contract drafting," which he believed he was competent to do.

Orr contacted an attorney in Washington, D.C., for assistance with the trademark and copyright portions of franchising, and that attorney warned Orr that franchising was a specialized field.

In December 2002, Orr drafted a disclosure statement. Orr used the disclosure statement he had recently reviewed on behalf of the previously mentioned franchisee, as well as "FTC documents," to finish the statement in January 2003. Orr's understanding was that a disclosure statement was required by the Federal Trade Commission (FTC) in order to inform the franchisee of the more important terms and conditions of the franchise agreement.

From 2003 to 2006, Barista's sold 21 franchises. In July 2004, Sickler was contacted by a banker in Colorado, inquiring on behalf of a prospective franchisee. The banker requested the "UFOC" of Barista's, and, unaware of what a UFOC was, Sickler referred the banker to Orr. Orr determined that the then-current disclosure statement of Barista's was "compliant and valid" and could be used anywhere. Sickler testified that Orr told him that the UFOC was a requirement of federal law which Barista's was "probably going to have to get" if it was "going to be selling franchises out of state."

In August 2004, Orr revised the franchise agreement and disclosure statement at Sickler's request due to problems Barista's was having with a franchisee in Iowa. The Iowa franchisee had been provided with copies of the initial franchise agreement and disclosure statement. However, in February 2004, the Iowa franchisee's attorney sent a letter to Sickler suggesting that Barista's had not complied with federal disclosure requirements.

Sickler and Orr dispute at what point Orr was provided with a copy of that letter. But despite being aware that Barista's was working with prospective franchisees in Iowa and Colorado, Orr did not advise Sickler to seek input from local counsel in those states. And Sickler testified that the revised franchise agreement and disclosure statement were also provided to prospective franchisees in Kansas.

In October 2004, due to an unrelated dispute, Sickler and Mettenbrink sued the Colorado franchisees to terminate the

franchises. A counterclaim was filed alleging deceptive and unfair trade practices, violation of FTC rules, and violation of Nebraska's Seller-Assisted Marketing Plan Act.[1] Orr's associate, Bradley Holbrook, became lead counsel for this litigation, although Orr remained primarily responsible for the representation of Barista's. Holbrook researched Nebraska law and discussed the case with Orr, including the fact that the Colorado franchisees were challenging the disclosure statement.

Disagreements were also ongoing with the Iowa franchisee, who eventually demanded rescission of the franchise agreement based on Barista's failure to comply with federal and Iowa disclosure laws. The Iowa franchisee's attorney demanded that Sickler return the franchise fee and pay attorney fees and other damages, and informed Sickler that he and Mettenbrink could be held personally liable under certain provisions of Iowa law. Sickler then informed Orr of the problem. Orr advised Sickler that the firm was going to contact an Omaha, Nebraska, attorney for a second opinion. Holbrook then contacted the Omaha attorney for a second opinion, which was provided in a June 2005 memorandum. It is not clear whether a copy of the memorandum was provided to Sickler and Mettenbrink, but they were ultimately informed of its conclusions and advised by Orr not to sell any more franchises without considerable changes to the disclosure statement.

A third version of the disclosure statement was created and used. Sickler stated he was told that the disclosure statement was now "compliant with every state," but Orr stated he also told Sickler that for out-of-state franchises, Sickler should get advice from local counsel. Orr stated that before the third revision of the disclosure statement, he had been under the impression that FTC requirements overrode state law. But he advised Sickler to obtain local counsel because he had become aware that state law could be more stringent than federal requirements.

The Iowa franchisee filed suit in Iowa and, according to Sickler, obtained personal judgments against Sickler and

[1] See Neb. Rev. Stat. §§ 59-1701 to 59-1762 (Reissue 2004).

Mettenbrink. Barista's sold seven more franchises using the third disclosure statement, but was notified by the FTC in November 2005 that Barista's was under investigation. Holbrook contacted an attorney specializing in franchise law regarding the FTC investigation. The specializing attorney reviewed the franchise documents of Barista's and concluded those documents—including the third disclosure statement—did not comply with FTC rules. The attorney characterized the deficiencies as "major."

Recognizing that it now had a conflict of interest, Orr's law firm withdrew from representing Sickler and Mettenbrink. The attorney specializing in franchising law continued to represent Sickler and Mettenbrink, and Barista's, with respect to the FTC issues. The FTC civil penalty has been suspended indefinitely, and will not have to be paid so long as the disclosures of Barista's are truthful. By April 2006, however, the franchising of Barista's had "virtually been shut down." Orr's law firm has paid for the revision of the franchising documents, as well as the research and second opinion obtained regarding the original franchising document.

Formal charges were filed against Orr on August 24, 2007, alleging that Orr had violated several sections of the Nebraska Rules of Professional Conduct and several sections of the now-superseded Code of Professional Responsibility. This court appointed a referee, and after a hearing, the referee found that Orr had violated his oath of office as an attorney. The referee also found that Orr had violated Canon 1, DR 1-102(A)(1), and Canon 6, DR 6-101(A)(1) and (2), of the Code of Professional Responsibility, as well as §§ 1.1 and 8.4(a) of the Nebraska Rules of Professional Conduct (now codified at Neb. Ct. R. of Prof. Cond. §§ 3-501.1 and 3-508.4(a)). DR 1-102(A)(1) and § 3-508.4(a) prohibit an attorney from violating the relevant rules of conduct.

Section 3-501.1 provides that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation." Similarly, DR 6-101 provides that a lawyer shall not handle a legal matter "which the lawyer knows or should know that he

or she is not competent to handle, without associating with a lawyer who is competent to handle it," or "without preparation adequate in the circumstances." The referee recommended that a public reprimand be issued.

Orr did not take exception to the referee's report. This court granted the Counsel for Discipline's motion for judgment on the pleadings, but ordered briefing and argument on the appropriate sanction to be imposed.

ANALYSIS

As an initial matter, we first note that because some of the conduct at issue occurred prior to September 1, 2005, it is governed by the now-superseded Code of Professional Responsibility; other conduct occurred on or after September 1, the effective date of the Nebraska Rules of Professional Conduct, and is therefore governed by those rules.[2]

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[3] To sustain a charge in a disciplinary proceeding against an attorney, a charge must be supported by clear and convincing evidence.[4] Violation of a disciplinary rule concerning the practice of law is a ground for discipline.[5]

[4] As noted, no exceptions were filed in response to the referee's report. When no exceptions to the referee's findings of fact are filed by either party in an attorney discipline proceeding, this court may, in its discretion, consider the referee's findings final and conclusive.[6] We consider the finding of facts in the referee's report to be final and conclusive, and based on those findings, we conclude that the formal charges are supported by clear and convincing evidence. Specifically, we conclude that Orr violated his oath of office as an attorney,[7]

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[2] See, e.g., *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

[3] *State ex rel. Counsel for Dis. v. Zendejas*, 274 Neb. 829, 743 N.W.2d 765 (2008).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Neb. Rev. Stat. § 7-104 (Reissue 2007).

DR 1-102(A)(1) and DR 6-101(A)(1) and (2) of the Code of Professional Responsibility, and §§ 3-501.1 and 3-508.4(a) of the Nebraska Rules of Professional Conduct. Accordingly, we grant in part the Counsel for Discipline's motion for judgment on the pleadings.

[5] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[8] Neb. Ct. R. § 3-304 states that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court[.]
> . . . .
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

[6-8] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[9] This court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.[10] The determination of an appropriate penalty to be imposed also requires the consideration of any aggravating or mitigating factors.[11]

[9,10] We have previously stated that "'the purpose of a disciplinary proceeding against an attorney is not so much to punish the attorney as it is to determine whether in the public interest an attorney should be permitted to practice.'"[12] We also note that while Orr's conduct caused financial consequences to his clients, the Nebraska Rules of Professional Conduct

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[8] *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007).

[9] *Zendejas*, *supra* note 3.

[10] See *id.*

[11] *Id.*

[12] *State ex rel. NSBA v. Hogan*, 272 Neb. 19, 27, 717 N.W.2d 470, 477 (2006).

"are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."[13] For those reasons, we accept the referee's recommendation of a public reprimand.

The referee explicitly found the existence of a number of mitigating factors, including the fact that Orr had practiced law for 40 years and has had no prior complaints or penalties. The referee noted that a number of clients, business and community leaders, and members of the bar sent letters of support and recommendation. Orr also has served the legal community and the community at large. And while the conduct occurred over a long period of time, only one client was involved, and Orr's misconduct was an isolated occurrence rather than part of a recurring pattern.

Although the Counsel for Discipline argued that the appropriate sanction in this case was a 60-day suspension, Orr failed to file exceptions to the referee's findings of fact. The referee found Orr negligently determined that he was competent and did not knowingly engage in the practice of law in which he was not competent. We have found no support in the case law for a suspension for incompetence without other misconduct, such as dishonesty.[14] Furthermore, the ABA Standards for Imposing Lawyer Sanctions provide the appropriate sanction for an attorney's lack of competence under DR 6-101:

> 4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.
>
> 4.53 Reprimand is generally appropriate when a lawyer:

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[13] Nebraska Rules of Professional Conduct, Preamble ¶ 20.

[14] See, *State ex rel. Counsel for Dis. v. Pinard-Cronin*, 274 Neb. 851, 743 N.W.2d 649 (2008); *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003); *State ex rel. Counsel for Dis. v. Rickabaugh*, 264 Neb. 398, 647 N.W.2d 641 (2002); *State ex rel. Nebraska State Bar Assn. v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975).

> (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
>
> (b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.[15]

[11] That is not to say we are unconcerned about Orr's conduct. We have said that "[i]t is inexcusable for an attorney to attempt any legal procedure without ascertaining the law governing that procedure."[16] As a lawyer who has been practicing law for 40 years, Orr should have been aware that he was not competent to represent franchisors, and he was warned by another attorney that franchise law was a specialized area. At the very least, Orr should have done the research necessary to become competent in the area of franchise law. The fact that Orr did little or no research into state or federal franchising law until long after he first received notice that there was a problem with the franchising documents is inexcusable.

We take this opportunity to caution general practitioners against taking on cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas. General practitioners must be particularly careful when practicing in specialty areas. "If a general practitioner plunges into a field in which he or she is not competent, and as a consequence makes mistakes that demonstrate incompetence, the Code [of Professional Responsibility] demands that discipline be imposed . . . ."[17]

Based upon our consideration of the record in this case, we conclude that Orr violated his oath of office as an attorney,[18] DR 1-102(A)(1) and DR 6-101(A)(1) and (2) of the Code of Professional Responsibility, and §§ 3-501.1 and 3-508.4(a) of

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[15] ABA Standards for Imposing Lawyer Sanctions §§ 4.52 and 4.53 (2005).

[16] *Holscher, supra* note 14, 193 Neb. at 737, 230 N.W.2d at 80.

[17] *Attorney Griev. Comm'n v. Brown*, 308 Md. 219, 234, 517 A.2d 1111, 1118-19 (1986).

[18] § 7-104.

the Nebraska Rules of Professional Conduct. For the above reasons, we accept the recommendation of the referee and issue a public reprimand.

CONCLUSION

The motion of the Counsel for Discipline is sustained in part and in part overruled. We adopt the referee's findings of fact and find by clear and convincing evidence that Orr violated DR 1-102(A)(1) and DR 6-101(A)(1) and (2) of the Code of Professional Responsibility and §§ 3-501.1 and 3-508.4(a) of the Nebraska Rules of Professional Conduct, as well as his oath of office as an attorney. It is the judgment of this court that Orr should be, and hereby is, publicly reprimanded.

JUDGMENT OF PUBLIC REPRIMAND.

WRIGHT and CONNOLLY, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V.
TERRENCE D. MOORE, APPELLANT.
759 N.W.2d 698

Filed January 30, 2009. No. S-08-417.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.
4. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
5. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Scott C. Sladek, Joseph J. Kehm, and Sean M. Conway for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Terrence D. Moore pled guilty to two counts of second degree murder and two counts of use of a firearm to commit a felony. The district court sentenced Moore to imprisonment for "a period of Life to Life" on one count of second degree murder and 50 to 50 years' imprisonment on the associated use of a deadly weapon to commit a felony conviction. As to the other count of second degree murder, Moore was sentenced to 30 to 45 years' imprisonment; on the associated use of a deadly weapon to commit a felony conviction, Moore was sentenced to 20 to 30 years' imprisonment. All sentences were ordered to be served consecutively. Moore appeals. We affirm.

BACKGROUND

Moore pled guilty to two counts of second degree murder and two counts of use of a deadly weapon to commit a felony for the shooting deaths of Terry Jasper and Diane Caveye. A more detailed factual account can be found in our prior opinion in this case.[1]

Moore was originally sentenced on May 23, 2006. In a memorandum opinion filed on January 4, 2007, in case No. S-06-699, we vacated Moore's sentences and remanded the cause for resentencing. Resentencing took place on March 20, 2007. At that time, Moore was sentenced to 30 to 45 years' imprisonment on each count of second degree murder, sentences to be served concurrently, and 10 to 10 years' imprisonment on each use of a deadly weapon conviction,

[1] *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

sentences to be served consecutively to one another and to the sentences for second degree murder. The State then appealed, arguing the sentences were excessively lenient. We agreed, vacated those sentences, and again remanded the cause for resentencing.[2]

Upon resentencing, Moore was sentenced to life to life imprisonment on the first count of second degree murder and 50 to 50 years' imprisonment on the associated use of a deadly weapon to commit a felony conviction. As to the second count of second degree murder, Moore was sentenced to 30 to 45 years' imprisonment; on the associated use of a deadly weapon to commit a felony conviction, Moore was sentenced to 20 to 30 years' imprisonment. All sentences were ordered to be served consecutively.

Moore appeals.

ASSIGNMENTS OF ERROR

On appeal, Moore assigns, restated, that (1) the sentence imposed by the district court of life to life imprisonment for second degree murder is not an authorized sentence and (2) the sentences were excessive.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[3]

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[4] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[5]

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[2] *Id.*

[3] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[4] *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[5] *Id.*

ANALYSIS

Life to Life Imprisonment as Authorized Sentence for Class IB Felony.

On appeal, Moore argues that the life to life sentence imposed by the district court was not an authorized penalty under Neb. Rev. Stat. § 29-2204(1)(a) (Reissue 2008), which provides in part that in imposing an indeterminate sentence upon an offender, the court shall

> (ii) Beginning July 1, 1998:
>
> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term and the maximum limit shall not be greater than the maximum provided by law[.]

In *State v. Marrs*,[6] we rejected the argument now advanced by Moore, that life to life imprisonment was not an authorized sentence. This court concluded that there was

> no statutory requirement that the affirmatively stated minimum term for a Class IB felony sentence be less than the maximum term [and that a]lthough § 29-2204(1)(a)(ii) permits a sentencing judge imposing a maximum term of life imprisonment for a Class IB felony to impose a minimum term of years not less than the statutory mandatory minimum, it does not require the judge to do so.[7]

We therefore held that a life to life sentence for second degree murder was a permissible sentence under § 29-2204.

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[6] *State v. Marrs*, *supra* note 3.

[7] *Id.* at 578, 723 N.W.2d at 504.

Moore acknowledges that *Marrs* is on point, but contends that we should revisit that decision. In support of this contention, Moore directs us to our opinion in *Poindexter v. Houston*.[8] Moore argues that in *Poindexter*, which was decided after *Marrs*, we concluded that a sentence with a minimum term of life is in effect a sentence of life imprisonment without parole. Moore argues that under Neb. Rev. Stat. § 28-105 (Reissue 2008), which sets forth the range of penalties for felonies, such a sentence is only permissible for a Class IA felony. Because Moore was convicted of a Class IB felony, he argues, his life to life sentence was in violation of § 28-105. We decline Moore's invitation to reverse *Marrs*.

As an initial matter, we disagree with Moore's characterization of our opinion in *Poindexter*. In *Poindexter*, we were presented with the question of whether Nebraska law required the commutation of a life sentence to a term of years before a defendant was eligible for parole; we concluded that in both 1969 and 2008, such was required. We made no finding that a life to life sentence was in effect a life sentence without parole.

And to the extent that Moore argues that his life to life sentence was in violation of § 28-105, we also reject that contention. Though admittedly not expressly addressed in *Marrs*, it is clear from a review of the *Marrs* decision that in interpreting § 29-2204, this court was aware of and considered § 28-105.

Moore's first assignment of error is without merit.

Excessive Sentences.

[3-5] Moore also argues that the sentences imposed by the district court were excessive. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved

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[8] *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

in the commission of the crime.[9] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.[10] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[11]

We have reviewed the record and conclude that the district court did not abuse its discretion in sentencing Moore as it did. Moore's argument that his sentences were excessive is also without merit.

CONCLUSION

For the reasons discussed above, we conclude that Moore's arguments on appeal are without merit. We therefore affirm the judgment of the district court.

AFFIRMED.

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[9] *State v. Reid, supra* note 4.

[10] *Id.*

[11] *Id.*

MEHRUZ KAMAL, APPELLEE, V. SOHEL MOHAMMED IMROZ, APPELLANT.

759 N.W.2d 914

Filed January 30, 2009. No. S-08-491.

1. **Child Custody.** Neb. Rev. Stat. §§ 42-364(3) and 43-2923 (Reissue 2008) require the district court to devise a parenting plan and to consider joint legal and physical custody. The statutes do not require the district court to grant equal parenting time to the parents if such is not in the child's best interests.
2. **Child Custody: Appeal and Error.** The Nebraska Supreme Court reviews child custody determinations de novo on the record, but the trial court's decision will normally be upheld absent an abuse of discretion.
3. **Child Custody.** The fact that one parent might interfere with the other's relationship with the child is a factor that the trial court may consider in granting custody, but it is not a determinative factor.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Adam E. Astley and Virginia A. Albers, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellant.

Kathleen M. Schmidt for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Sohel Mohammed Imroz appeals the decision of the Douglas County District Court, which entered a decree of dissolution ending Imroz' marriage to Mehruz Kamal. The court granted sole legal and physical custody of the couple's minor son to Kamal, with liberal rights of visitation to Imroz. The district court also divided the couple's assets and debt, ordered Imroz to pay child support, and prohibited either party from taking their son out of the United States without written consent of the other. Imroz appeals. We affirm the decision of the district court.

BACKGROUND

Imroz and Kamal were married on May 25, 2003, in Jamaica, New York. The marriage was arranged by the parents of Imroz and Kamal, and the couple was married pursuant to Islamic law. Kamal then moved to Omaha, Nebraska, to live with Imroz. The couple's son was born on July 28, 2004. Kamal moved out of her husband's apartment in December 2004. She subsequently moved in with her parents, who had immigrated to the United States. The parties continued to live separately until July 26, 2006, when Kamal filed for divorce.

At that time, Kamal also filed a motion for an ex parte restraining order and for custody of the child. Kamal made a number of allegations in her request for a restraining order, including an allegation that the child was in physical and emotional danger from Imroz. Kamal further alleged that Imroz frequently became angry and aggressive, that Imroz had withheld information about his baldness and general health prior to the marriage, and that Imroz had not provided for her sufficiently during the course of the marriage.

Kamal further alleged that Imroz locked her in the apartment during the day while he was at work. Kamal alleged that Imroz shook her and that his "arrogant and aggressive" attitude made it impossible for her to deal with him in person. Kamal alleged that Imroz was an Islamic fundamentalist and that he desired to raise their son as such. Kamal testified at the hearing that she was concerned Imroz would take their son to Bangladesh and keep him there and that Imroz had previously taken their son out of the state without telling Kamal or getting her permission.

Imroz denied the allegations. He testified that he gave Kamal a spare set of keys immediately after she moved in to the apartment and that it would be impossible to lock someone inside. Imroz testified that he willingly drove Kamal wherever she wanted to go during the time they had only one vehicle. Imroz also testified that he drove Kamal's parents while they were visiting, and later when they needed to apply for welfare. Imroz also testified that Kamal had made communication regarding their son very difficult because she insisted on communicating only through e-mail.

Imroz testified that he is a practicing Muslim, but that he is respectful of other religions and participates in an interfaith group. Imroz also asked that he be allowed to take his son to Bangladesh to visit the child's great-grandmother. A clinical psychologist, who testified on Imroz' behalf, stated that it was his belief Imroz is a strongly attached father who has a good bond with his son.

The undisputed facts were that Kamal currently worked from home most days and that she had been the primary caregiver for her son since his birth. Kamal is an international student who is currently being sponsored by her mother for the purpose of retaining her student visa. Imroz works full time and is a U.S. citizen. Kamal requested sole custody of their son; Imroz requested that they be given joint custody or, in the alternative, that he be awarded sole custody. The parties both admitted that there had been a great deal of tension over visitation and that as a result, their attorneys had been required to get involved on more than one occasion.

In its decree, the trial court found that both Kamal and Imroz were fit persons to have custody, but that because of the conflict between the parents, joint custody was not in their son's best interests. The court further found that because Kamal had a flexible work schedule and could spend most of her time with their son, she should be awarded sole legal and physical custody with liberal rights of visitation to Imroz. The district court ordered Imroz to pay $815 per month in child support, required Imroz to maintain insurance for the child, and made equitable division of the marital estate. Finally, the district court ordered that Kamal apply to the district court before moving out of the state and required both parties to get the written consent of the other before taking their son out of the country.

ASSIGNMENTS OF ERROR

Imroz contends the district court erred by (1) failing to grant joint custody to the parties, (2) failing to allocate adequate parenting time to Imroz, (3) failing to calculate Imroz' child custody obligation based on a joint custody calculation, and (4) prohibiting Imroz from traveling to Bangladesh with his son.

ANALYSIS

Parenting Act Does Not Require Joint Custody

We first address Imroz' argument that the district court erred when it failed to grant joint custody. Neb. Rev. Stat. § 42-364(3) (Reissue 2008) states that

> [c]ustody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

A parenting plan developed by the court is required to "[a]ssist in developing a restructured family that serves the

best interests of the child by accomplishing the parenting functions . . . ."[1] Section 43-2929 lists the determinations the trial court is to make when developing the parenting plan, including legal and physical custody of each child; apportionment of parenting time, visitation, and holidays; location of each child during the week, weekend, and given days during the year; and procedures for making decisions regarding the day-to-day care and control of the child.

Imroz contends that § 43-2929 requires the district court to devise and apply a plan that involves both parents to the maximum amount possible. Imroz' interpretation of § 43-2929 would require the district court to enforce a joint custody agreement or, in the alternative, to grant custody to the parent most likely to foster a relationship with the noncustodial parent. In the present case, Imroz contends that under those guidelines he should be granted primary custody of the child.

The current Parenting Act states:

> The best interests of the child require:
>
> (1) A parenting arrangement and parenting plan or other court-ordered arrangement which provides for a child's safety, emotional growth, health, stability, and physical care . . . ;
>
> . . . .
>
> (3) That the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child;
>
> (4) That even when parents have voluntarily negotiated or mutually mediated and agreed upon a parenting plan, *the court shall determine whether it is in the best interests of the child for parents to maintain continued communications with each other and to make joint decisions*

[1] Neb. Rev. Stat. § 43-2929(1)(a) (Reissue 2008).

> *in performing parenting functions as are necessary for the care and healthy development of the child.*[2]

(Emphasis supplied.)

In contrast, § 42-364(2) (Reissue 2004), in defining best interests of the child, stated in relevant part that the court

> shall consider the best interests of the minor child which shall include, but not be limited to:
>
> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
>
> (b) The desires and wishes of the minor child if of an age of comprehension, regardless of chronological age, when such desires and wishes are based on sound reasoning;
>
> (c) The general health, welfare, and social behavior of the minor child; and
>
> (d) Credible evidence of abuse inflicted on any family or household member.

[1] A commonsense reading of the revised version of § 42-364,[3] as well as § 43-2923, indicates that the district court still has discretion in determining what the best interests of the child are. The current § 43-2929 mandates that a "parenting plan *shall* serve the best interests of the child," and the current § 43-2923 mandates that the court "*shall* determine whether it is in the best interests of the child for parents to maintain continued communications with each other." (Emphasis supplied.) In essence, the current §§ 42-364(3) and 43-2923 require the district court to devise a parenting plan and to consider joint legal and physical custody. The statutes do not *require* the district court to grant equal parenting time or joint custody to the parents if such is not in the child's best interests.

In the present case, the trial judge made a specific finding that Kamal had been the child's primary caregiver and that her flexible work schedule made it possible for her to be with her son nearly full time. The district court also found that

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[2] Neb. Rev. Stat. § 43-2923 (Reissue 2008).

[3] § 42-364 (Reissue 2008).

because the parents were unable to communicate face-to-face and because there is a level of distrust between the parents, joint decisionmaking by the parents was not in the child's best interests. This decision is consistent with the mandatory statutory language requiring the court to determine whether it is in the best interests of the child for the parents to maintain continued communication.[4] The district court did not fail to apply the standards of the current Parenting Act correctly, nor did it abuse its discretion in its grant of parenting time to Imroz. Imroz' first assigned error is without merit.

District Court Did Not Abuse Its Discretion When Granting Custody to Kamal

[2,3] Imroz next argues that Kamal has been uncooperative in allowing visitation and therefore he should be granted sole custody because he is more likely to foster a meaningful relationship with the noncustodial parent. While we review child custody determinations de novo on the record, the trial court's decision will normally be upheld absent an abuse of discretion.[5] As we have recognized above, the current Parenting Act differs very little from the previous statutory scheme, and therefore case law addressing a change in custody is still generally applicable. The fact that one parent might interfere with the other's relationship with the child is a factor the trial court may consider in granting custody, but it is not a determinative factor.[6] And while interference with the other parent's visitation rights can arise to a material change in circumstances sufficient to alter a parenting plan, there is no indication at present that Kamal will ignore the trial court's order.[7] We find the district court did not abuse its discretion in granting custody to Kamal.

The same principles apply to Imroz' contention that the district court did not award him adequate parenting time. The

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[4] See, also, *Coffey v. Coffey*, 11 Neb. App. 788, 661 N.W.2d 327 (2003).

[5] *Maska v. Maska*, 274 Neb. 629, 742 N.W.2d 492 (2007).

[6] *Id.*

[7] See, *Hibbard v. Hibbard*, 230 Neb. 364, 431 N.W.2d 637 (1988); *Coffey, supra* note 4.

parenting plan grants Imroz visitation every other weekend, every Wednesday from 6 p.m. to Thursday at 6 p.m., and 10 consecutive days in the summer. The district court also outlined the visitation schedule for holidays. The district court made it clear that the division of parenting time between the parties was devised in the best interests of the child.

Because we find that the district court did not commit an abuse of discretion in its division of parenting time, we affirm the order of the district court. Imroz' assignment of error as to parenting time is without merit. We are therefore not required to address the issue of child support, as Imroz admitted that the district court's findings as to child support were correct if custody remained with Kamal.

District Court Did Not Abuse Its Discretion When It Restricted Parties' Ability to Remove Child From Country

Imroz finally argues that the district court erred when it restricted his ability to travel with his child outside of the country. In its order, the district court forbade both parties from taking the child out of the country without written permission from the other parent. Imroz stated that he wishes to take his child to Bangladesh to visit family, specifically the child's great-grandmother.

The only finding the district court made with respect to its order that Imroz not take his child out of the country without Kamal's written permission was that Kamal feared Imroz would take the child to Bangladesh and not return. Kamal's fear was supported by the fact that Imroz once took the child out of the state without informing her.

The prohibition is not absolute, however, and Kamal expressed her willingness to allow the child to travel outside the country when he is a little older. We cannot say the trial court abused its discretion in this matter. Imroz' final assignment of error is also without merit.

CONCLUSION

We find that the district court correctly interpreted the standards of the current Parenting Act. We also find that the district

court did not abuse its discretion when devising the parenting plan and by granting custody of the parties' child to Kamal. Nor did the court abuse its discretion by restricting either party from taking the child out of the country without the written consent from the other parent. We therefore affirm the district court's order.

AFFIRMED.

STEVEN S., APPELLEE, V.
MARY S., APPELLANT.
760 N.W.2d 28

Filed January 30, 2009. No. S-08-622.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. **Actions: Statutes.** Special proceedings include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.
6. **Actions: Statutes: Words and Phrases.** An action is any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.
7. **Actions: Modification of Decree.** Proceedings regarding modification of a marital dissolution, which are controlled by Neb. Rev. Stat. § 42-364 (Reissue 2008), are special proceedings.

8. **Final Orders: Words and Phrases: Appeal and Error.** For purposes of determining whether an order from which an appeal is taken affects a substantial right, a "substantial right" is an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
9. **Pretrial Procedure: Final Orders: Appeal and Error.** Discovery orders, such as an order for a mental examination, are not generally subject to interlocutory appeal, because the underlying litigation is ongoing and the discovery order is not considered final.

Appeal from the District Court for Kearney County: STEPHEN R. ILLINGWORTH, Judge. Appeal dismissed.

Grant A. Forsberg, of Forsberg & Jolly Law, P.C., L.L.O., for appellant.

Susan K. Alexander for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Steven S. and Mary S. are the parents of twin girls. After their divorce, the court awarded the parties joint legal custody of the children, but awarded primary physical custody to Steven subject to Mary's rights of visitation. Each party now accuses the other of sexually abusing the children, and each party filed petitions and motions seeking custody and other relief. But following an investigation by the Nebraska State Patrol, Mary was arrested for sexual assault on a child.

After a hearing, the district court entered an order that, among other things, awarded temporary legal and physical custody to Steven, ordered Mary to have no further contact with her minor children until further order of the court, and ordered Mary to submit to an extensive psychological evaluation. Mary appeals that order. The primary issue presented on appeal is whether the order is final and appealable. We conclude that it is not, and dismiss this appeal for lack of jurisdiction.

FACTS

Steven and Mary were married in 2004. They are the parents of twin daughters, born in August 2004. Steven and Mary separated and divorced in 2006. The court awarded joint legal custody of the children, with primary physical custody awarded to Steven subject to Mary's rights of visitation.

Both parties accuse the other of sexually abusing the children. Throughout the dissolution proceedings, Mary took the children to various medical doctors in an attempt to show that Steven was physically and sexually abusing them. As a result, the court ordered Mary not to take the children to any health care provider absent a true medical emergency.

In 2007, the girls returned from a visit with Mary and were tearful and "clingy." Steven was concerned and took them to a child abuse counseling center. Shortly after that visit, Mary reported to law enforcement on three occasions that Steven was physically and sexually abusing the children. The Nebraska State Patrol investigated and determined that Mary's accusations of abuse were unfounded. Based on the Nebraska State Patrol's investigation and allegations made by the girls in therapy sessions, Mary was arrested for sexual assault on a child.

Before her arrest, on April 18, 2008, Mary filed an application to modify the decree of dissolution. In her application, Mary alleged that Steven had engaged in emotional and physical abuse of the children and she requested sole legal and physical custody of the children. On the same day, Mary also filed an application for an ex parte order awarding her temporary custody. The district court granted Mary's application and awarded temporary custody of the children to Mary and suspended Steven's visitation until further order of the court.

On April 22, 2008, Steven filed a motion to set aside the ex parte order, claiming that Mary had made false allegations against him as a means of gaining custody. Steven also alleged that after the court had entered the ex parte order awarding custody to Mary, the Nebraska State Patrol had arrested Mary for sexual assault on a child and placed the children in the custody of the State. The court vacated its ex parte

order granting Mary temporary custody, and the children were returned to Steven.

On April 28, 2008, Steven moved for an order (1) temporarily suspending Mary's visitation rights, (2) directing both parties to submit to evaluations by a court-appointed psychologist, (3) directing Mary to submit to an extensive psychological evaluation by a court-appointed psychologist, and (4) awarding attorney fees. The following day, Steven also filed an answer and cross-application to Mary's application to modify the decree, arguing that it was in the best interests of the children to suspend Mary's visitation rights and place the children in the sole legal and physical custody of Steven. The answer and cross-application also requested that Mary be ordered to submit to a psychological evaluation and that a custody evaluation take place. The court held a hearing on the "temporary custody motion to suspend visitation and to submit to an evaluation, and motion to appoint a guardian ad litem." After the hearing, Mary filed a motion for temporary custody.

In an order dated May 16, 2008, the district court overruled Mary's application to modify temporary custody and placed temporary legal and physical custody with Steven. The court also sustained Steven's motion to suspend visitation and ordered Mary to have no further contact with the minor children until further order of the court. The court declined to appoint a guardian ad litem. The district court also sustained Steven's motion to reappoint a court-appointed psychologist to further evaluate the parties and submit a recommendation on permanent custody. Finally, the court ordered Mary to submit to an extensive psychological evaluation to determine whether she suffers from any psychiatric disorders including, but not limited to, "Munchausen Syndrome by Proxy." Mary appeals the May 16 order.

ASSIGNMENTS OF ERROR

Mary assigns, restated, that the district court erred in (1) admitting certain exhibits, (2) awarding Steven sole legal and physical custody of the parties' minor children and ruling that Mary shall have no further contact with the minor children, (3) determining that Mary must submit to a psychological

evaluation by the court-appointed psychologist, and (4) determining that Mary must submit to and partially fund a child custody evaluation by the court-appointed psychologist.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[1]

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[2] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.[3] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[4] In this case, the order on appeal did not determine the action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Thus, we consider whether the order was made during a special proceeding and affected a substantial right.[5]

[5,6] We have construed the phrase "special proceedings" to include every special civil statutory remedy not encompassed in civil procedure statutes which is not in itself an action.[6] An action is any proceeding in a court by which a

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[1] *Timmerman v. Neth*, 276 Neb. 585, 755 N.W.2d 798 (2008).

[2] *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005).

[3] *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

[4] See, *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006); Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[5] See *In re Guardianship of Sophia M.*, *supra* note 4.

[6] *Id.*

party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the statute and ending in a final judgment.[7] Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding.

[7] This appeal arises out of proceedings regarding the modification of a marital dissolution. As mentioned above, we have construed the phrase "special proceedings" to mean civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.[8] Under this definition, proceedings regarding modification of a marital dissolution, which are controlled by Neb. Rev. Stat. § 42-364 (Reissue 2008), are special proceedings. Likewise, custody determinations, which are also controlled by § 42-364, are considered special proceedings.[9]

[8] Having determined that this was a special proceeding, we next consider whether a substantial right was affected. A substantial right is an essential legal right, not a mere technical right.[10] A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.[11]

Relying on our recent holding in *In re Guardianship of Sophia M.*, Steven argues that this court lacks jurisdiction to hear this appeal, because the district court's order did not affect a substantial right. Mary, on the other hand, argues that this case differs from *In re Guardianship of Sophia M.*, because in

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[7] *Id.*

[8] See, *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000); *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994), *overruled in part on other grounds, Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999).

[9] *State ex rel. Reitz v. Ringer, supra* note 8.

[10] See, *In re Guardianship of Sophia M., supra* note 4; *In re Estate of Peters, supra* note 8.

[11] See, *In re Guardianship of Sophia M., supra* note 4; *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006).

that case, visitation rights were temporarily suspended pending permanent proceedings. Mary asserts that the language of the order in this case permanently suspends her visitation and custody rights.

In *In re Guardianship of Sophia M.*, the grandparents petitioned the district court to be appointed coguardians of their granddaughter. The county court granted the grandparents' request for a mental examination of the mother and denied the mother's request for immediate visitation. We dismissed the mother's appeal for lack of jurisdiction, concluding that neither the mental examination nor the temporary visitation order affected a substantial right. As in *In re Guardianship of Sophia M.*, the order in this case is not final and appealable, because it does not affect a substantial right.

We first consider the district court's determination regarding custody and visitation. Although this case is a modification proceeding, the order, in part, concerned visitation, custody, and the relationship between Mary and her two daughters. Thus, we look to juvenile cases, in part, for guidance in determining if the denial of visitation and custody in this case affects a substantial right.[12] In regard to the issue of whether special proceedings involving juvenile matters affect substantial rights, we stated in *In re Interest of Borius H. et al.*[13]: "'[T]he question . . . whether a substantial right of a parent has been affected by an order in juvenile court litigation is dependent upon both the object of the order and the length of time over which the parent's relationship with the juvenile may reasonably be expected to be disturbed.'"

Here, the May 16, 2008, order suspends visitation and makes a temporary custody determination. The order states:

> 1. [Mary's] Application to Modify Temporary Custody is Overruled. Temporary legal and physical custody is placed with [Steven].

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[12] See *In re Guardianship of Sophia M.*, *supra* note 4.

[13] *In re Interest of Borius H. et al.*, 251 Neb. 397, 401, 558 N.W.2d 31, 34 (1997), quoting *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

> 2. [Steven's] Motion to Suspend Visitation is Sustained. [Mary] shall have no further contact with the minor children until further Order of the Court.
>
> . . . .
>
> 4. [Steven's] Motion to Re-appoint [the court-appointed psychologist] to further evaluate the parties and submit a recommendation on permanent custody is Sustained.

The plain language of the order, when taken in its proper context, only temporarily suspends Mary's rights to visitation and custody. In particular, the district court, in paragraph 4, sustained a motion to reappoint the court-appointed psychologist to further evaluate Mary and to "submit a recommendation on *permanent* custody." (Emphasis supplied.) Because Mary's relationship with the children will be disturbed for only a brief time period and the order was not a permanent disposition, we conclude that a substantial right was not affected.

In fact, to the extent that Mary's rights to seek custody and visitation were affected, that effect was magnified when Mary sought to appeal, thereby keeping the temporary order in place longer than it might have been otherwise. Any substantial rights placed at issue by a temporary custody order are more affected when an appeal is attempted. The goal of quickly resolving such disputes would be hindered, not assisted, by permitting interlocutory appeals.

[9] Nor does the ordered psychological examination make the court's order final and appealable. Discovery orders, such as the order for a mental examination here, are not generally subject to interlocutory appeal, because the underlying litigation is ongoing and the discovery order is not considered final.[14] However, as we discussed in *In re Guardianship of Sophia M.*, if the discovery order affects a substantial right and was made in a special proceeding, it is appealable.[15]

As in *In re Guardianship of Sophia M.*, the district court's order requiring Mary to submit to a mental examination does not diminish Mary's ability to contest any unfavorable results of the examination or defend her capacity to have custody

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[14] See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

[15] *In re Guardianship of Sophia M.*, *supra* note 4.

in the future modification proceedings. The remainder of the modification proceedings and a possible appeal of the order after final judgment provides Mary all necessary remedies. Although a mental examination, once ordered and performed, cannot be undone, we are not convinced that any harm caused by waiting to appeal the order until after final judgment is sufficient to warrant an interlocutory appeal. In contrast, allowing an interlocutory appeal in this case significantly delays the proceedings, and the ultimate resolution of the children's custody.

We note that the Nebraska discovery rules offer protection in the form of standards that must be met before an order for a mental examination may be issued.[16] Section 6-335 requires that to obtain an order for a physical or mental examination, the physical or mental condition of a party must be in controversy, and the moving party must show good cause for ordering the examination.[17] And, if warranted, an egregious error made by the court in ordering a mental examination could be challenged by the aggrieved party in a mandamus action.[18] Thus, we conclude that an order for a physical or mental examination pursuant to § 6-335 does not affect a substantial right and, therefore, is not a final, appealable order.[19]

Because the order on appeal is not a final, appealable order, we lack jurisdiction to address Mary's assignments of error, and we dismiss her appeal.

CONCLUSION

For the foregoing reasons, we conclude that the district court's order was not final and appealable. When an appellate court is without jurisdiction to act, the appeal must be dismissed. We, therefore, dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

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[16] See Neb. Ct. R. Disc. § 6-335.

[17] *Id.*

[18] See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

[19] *In re Guardianship of Sophia M.*, *supra* note 4.

STATE OF NEBRASKA, APPELLEE, V. WESLEY L. WILLIAMS, APPELLANT.

761 N.W.2d 514

Filed February 6, 2009. No. S-07-1048.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
3. **Speedy Trial: Indictments and Informations.** Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed.
4. **Speedy Trial.** To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) to determine the last day the defendant can be tried.
5. **Speedy Trial: Pretrial Procedure.** The plain terms of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay. The excludable period commences on the day immediately after the filing of a defendant's pretrial motion. Final disposition under § 29-1207(4)(a) occurs on the date the motion is granted or denied.
6. **Speedy Trial: Pretrial Procedure: Presumptions.** Pursuant to Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.
7. **Speedy Trial: Appeal and Error.** An interlocutory appeal taken by the defendant is a period of delay resulting from other proceedings concerning the defendant within the meaning of Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 2008).
8. **Speedy Trial: Jurisdiction: Appeal and Error.** In calculating the number of excludable days resulting from an interlocutory appeal, for speedy trial purposes, the period to be excluded due to the appeal commences on and includes the date on which the defendant filed his or her notice of appeal. Where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court first reacquires jurisdiction over the case by taking action on the mandate of the appellate court.
9. **Speedy Trial.** For speedy trial purposes, the calculation for a continuance begins the day after the continuance is granted and includes the day on which the continuance ends. In the case of an indefinite continuance, the calculation runs from the day immediately following the grant of the continuance and ends when the defendant takes some affirmative action, such as requesting a trial date, to show

his or her desire for the indefinite continuance to end or, absent such a showing, on the rescheduled trial date.

10. ____. Under Neb. Rev. Stat. § 29-1208 (Reissue 2008), if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to his or her absolute discharge.
11. **Speedy Trial: Proof.** The burden of proof is upon the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008) are applicable when the defendant is not tried within 6 months.
12. ____: ____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
13. **Courts: Speedy Trial.** Effective March 9, 2009, when ruling on a motion for absolute discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 2008), the trial court shall make specific findings of each period of delay excludable under Neb. Rev. Stat. § 29-1207(4)(a) to (e) (Reissue 2008), in addition to the findings under § 29-1207(f). Such findings shall include the date and nature of the proceedings, circumstances, or rulings which initiated and concluded each excludable period; the number of days composing each excludable period; and the number of days remaining in which the defendant may be brought to trial after taking into consideration all excludable periods.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This is an appeal from an order of the district court for Douglas County overruling Wesley L. Williams' motion for absolute discharge on statutory speedy trial grounds. We affirm the judgment of the district court.

I. BACKGROUND

On December 8, 2003, Williams was charged by information with first degree murder and use of a deadly weapon to commit a felony. Thereafter, he filed numerous motions and obtained several continuances. Trial was eventually scheduled

for September 5, 2006. On August 14, Williams filed a pro se motion to dismiss, which was treated as a motion for discharge on statutory speedy trial grounds and was overruled on August 23.

In case No. A-06-942, Williams appealed the denial of his motion for discharge. The Nebraska Court of Appeals summarily affirmed. Because of the summary disposition, neither the parties nor the district court was apprised of the Court of Appeals' specific reasons for concluding that the speedy trial clock had not run. The mandate was spread on the record of the district court on May 16, 2007.

After additional pretrial proceedings following remand, including continuances granted at Williams' request or with his consent, trial was scheduled for October 1, 2007. On September 28, Williams filed a second motion for discharge. At a hearing held on that date, the State argued that the motion was frivolous, but the district court made a finding that it was not. The court received evidence offered by Williams, including the testimony of the court's former bailiff and the affidavit of Williams' counsel regarding certain docket entries pertinent to the speedy trial calculation. The district court overruled the motion for discharge, and Williams then perfected this appeal, which we moved to our docket on our own motion.

II. ASSIGNMENT OF ERROR

Williams assigns that the district court erred in overruling his motion for discharge, because the State failed to bring his case to trial within the statutory 6-month period required by Neb. Rev. Stat. § 29-1207 (Reissue 2008).

III. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

[2] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds

[1] *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008); *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007).

is a factual question which will be affirmed on appeal unless clearly erroneous.[2]

IV. ANALYSIS

1. Subject Matter Jurisdiction

In *State v. Gibbs*,[3] this court held that to the extent Nebraska's speedy trial statutes[4] conferred a right to a speedy trial and authorized a special application to obtain judicial enforcement of that right, "a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable."[5] We reasoned that the ruling on a motion to discharge affected a substantial right, because "the rights conferred on an accused criminal by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence."[6] In *State v. Jacques*,[7] decided 1 week after *Gibbs*, we reiterated these principles in concluding that an appellate court lacked jurisdiction to adjudicate a statutory speedy trial issue in a direct appeal, because the defendant had not appealed within 30 days of the pretrial ruling denying his motion for discharge.

In this case, the State urges that we overrule *Gibbs* and *Jacques*, and hold that the order overruling Williams' motion for discharge on statutory speedy trial grounds was a nonfinal order for which there is no appellate jurisdiction.[8] The

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[2] *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007); *State v. Vasquez*, 16 Neb. App. 406, 744 N.W.2d 500 (2008).

[3] *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

[4] See Neb. Rev. Stat. §§ 29-1201 to 29-1209 (Reissue 2008).

[5] *State v. Gibbs*, *supra* note 3, 253 Neb. at 245, 570 N.W.2d at 330.

[6] *Id*.

[7] *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

[8] See *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006) (holding appellate court has duty to determine its jurisdiction).

State directs our attention to *State v. Wilson*,[9] decided by the Nebraska Court of Appeals in 2006. In that case, the defendant filed a pretrial motion for discharge, alleging that both his statutory and constitutional speedy trial rights had been violated. After conviction by a jury, but before sentencing, he filed an appeal alleging only that he was denied his constitutional rights to a speedy trial. The Court of Appeals dismissed the appeal after concluding that there was no final, appealable order. The court relied in part upon *United States v. MacDonald*,[10] which held that a criminal defendant may not, before trial, appeal an order denying his motion to dismiss on constitutional speedy trial grounds. The *MacDonald* Court reasoned that resolution of a constitutional speedy trial claim "necessitates a careful assessment of the particular facts of the case"[11] by application of the four-part balancing test established by the Court in *Barker v. Wingo*,[12] which includes a determination of whether delay was prejudicial to the defendant. The Court noted that prior to trial, "an estimate of the degree to which delay has impaired an adequate defense tends to be speculative"[13] and concluded that in most circumstances, the question of whether delay is prejudicial to the defense can only be fairly assessed after trial. In applying the reasoning of *MacDonald* and distinguishing our holdings in *Gibbs* and *Jacques*, the Court of Appeals has correctly noted that "speedy trial claims based on statutory grounds are more amenable to resolution prior to trial than are those claims based on constitutional grounds."[14] Another distinction, as noted in *Wilson*, is that there is no statutory remedy to enforce a claimed denial of the constitutional right to a speedy trial.

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[9] *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006).

[10] *United States v. MacDonald*, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978).

[11] *Id.*, 435 U.S. at 858.

[12] *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[13] *United States v. MacDonald*, *supra* note 10, 435 U.S. at 858.

[14] *State v. Wilson*, *supra* note 9, 15 Neb. App. at 220, 724 N.W.2d at 107.

Thus, we are not persuaded by the State's argument that *MacDonald* and *Wilson* undermine our reasoning in *Gibbs* and *Jacques*. A claimed denial of statutory speedy trial rights does not require any showing of prejudice; on a proper record, it is a relatively simple mathematical computation of whether the 6-month speedy trial clock, as extended by statutorily excludable periods, has expired prior to the commencement of trial. If it has, subjecting a defendant to trial would impair a substantial right in the same manner that rights of an accused criminal would be undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence.[15]

The State argues that we should follow the reasoning of federal courts which have held that because the federal Speedy Trial Act of 1974[16] does not confer a "'right not to be tried'" equivalent to that of the Double Jeopardy Clause, there is no right of interlocutory appeal from an order denying a motion to dismiss on statutory speedy trial grounds.[17] Our speedy trial statute precludes adoption of this reasoning, because the sanction for violation of Nebraska's speedy trial act differs significantly from that of the federal Speedy Trial Act of 1974. If a federal criminal defendant is not brought to trial within the time limit specified in the federal act, the court may dismiss with or without prejudice.[18] In making this determination, a federal court may consider various factors, including "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the act] and on the administration of justice."[19]

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[15] See, *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

[16] 18 U.S.C. §§ 3161 to 3174 (2006).

[17] See, e.g., *United States v. Mehrmanesh*, 652 F.2d 766, 769 (9th Cir. 1981).

[18] 18 U.S.C. § 3162(a)(2).

[19] *Id*.

Under Nebraska law, however, a judge has no such discretion. If a defendant is not brought to trial within the time period specified in the speedy trial act, the statute provides that "he shall be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."[20]

By using this language, the Nebraska Legislature has bestowed a "right not to be tried" upon a defendant who is not brought to trial within the statutory time period, as extended by excludable periods. *Gibbs* likened this right to the rights granted by the Double Jeopardy Clause and determined that the rights conferred on a criminal defendant by §§ 29-1207 and 29-1208 would be significantly undermined if appellate review of nonfrivolous speedy trial claims were postponed until after conviction and sentence. Because the sanction for violation of the federal act differs significantly from that in the Nebraska statute, this argument does not persuade us that *Gibbs* and *Jacques* were wrongly decided.

The State also argues that a right of interlocutory appeal from an order denying absolute discharge delays criminal trials. While this is true to some degree, Nebraska's speedy trial statute contemplates and indeed permits delay instigated by a defendant, in that it excludes from the speedy trial computation any periods of delay resulting from "pretrial motions of the defendant" and "a continuance granted at the request or with the consent of the defendant or his counsel."[21] As discussed below, most of the delay in this case resulted from such motions filed by Williams in the district court. The fact that some additional delay results from an interlocutory appeal initiated by a criminal defendant from the denial of a motion for discharge does not justify overruling *Gibbs* and *Jacques*.

Finally, we are not persuaded by the argument that we should change the law because of what the State perceives as abuse by criminal defendants of the right to take an immediate

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[20] § 29-1208.

[21] § 29-1207(4)(a) and (b).

appeal from an order denying a motion for discharge on statutory speedy trial grounds. As specifically stated in *Gibbs*, the right to appeal is triggered by denial of a "nonfrivolous claim" of violation of the statutory right to a speedy trial.[22] We note that the district court made a specific finding that Williams' statutory speedy trial claim presented in this appeal was *not* frivolous. For these reasons, we decline the State's invitation to overrule *Gibbs* and *Jacques*, and we conclude on the basis of those precedents that we have jurisdiction to reach and resolve the merits of this appeal.

2. Calculation of Speedy Trial Time

[3,4] Nebraska's speedy trial statutes provide in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section."[23] Where a felony offense is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information filed, and not from the time the complaint is filed.[24] Certain periods of delay are excluded from the speedy trial computation, including:

> (a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence, motions to quash the indictment or information, demurrers and pleas in abatement . . . .
>
> (b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel.[25]

To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under

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[22] *State v. Gibbs*, *supra* note 3, 253 Neb. at 245, 570 N.W.2d at 330.

[23] § 29-1207(1).

[24] *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

[25] § 29-1207(4).

§ 29-1207(4) to determine the last day the defendant can be tried.[26]

[5,6] The plain terms of § 29-1207(4)(a) exclude all time between the time of the filing of a defendant's pretrial motions and their final disposition, regardless of the promptness or reasonableness of the delay.[27] Such motions include a defendant's motion to suppress evidence and a motion for discovery filed by the defendant.[28] The excludable period commences on the day immediately after the filing of a defendant's pretrial motion.[29] Final disposition under § 29-1207(4)(a) occurs on the date the motion is "'"granted or denied."'"[30] Pursuant to § 29-1207(4)(a), it is presumed that a delay in hearing defense pretrial motions is attributable to the defendant unless the record affirmatively indicates otherwise.[31]

[7,8] An interlocutory appeal taken by the defendant is a period of delay resulting from other proceedings concerning the defendant within the meaning of § 29-1207(4)(a).[32] In calculating the number of excludable days resulting from an interlocutory appeal, for speedy trial purposes, the period to be excluded due to the appeal commences on and includes the date on which the defendant filed his or her notice of appeal.[33] Where further proceedings are to be had following an interlocutory appeal, for speedy trial purposes, the period of time excludable due to the appeal concludes when the district court

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[26] *State v. Sommer, supra* note 2; *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002). See, also, *State v. Feldhacker*, 11 Neb. App. 608, 657 N.W.2d 655 (2003), *affirmed as modified* 267 Neb. 145, 672 N.W.2d 627 (2004).

[27] See, *State v. Covey*, 267 Neb. 210, 673 N.W.2d 208 (2004); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

[28] *State v. Dockery*, 273 Neb. 330, 729 N.W.2d 320 (2007); *State v. Washington*, 269 Neb. 728, 695 N.W.2d 438 (2005).

[29] *State v.Baker, supra* note 26; *State v. Feldhacker, supra* note 26.

[30] *State v. Washington, supra* note 28, 269 Neb. at 731, 695 N.W.2d at 440.

[31] *State v. Turner, supra* note 27.

[32] See *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999), *disapproved on other grounds, State v. Feldhacker, supra* note 26.

[33] *State v. Baker, supra* note 26; *State v. Ward, supra* note 32.

first reacquires jurisdiction over the case by taking action on the mandate of the appellate court.[34]

[9] As noted, § 29-1207(4)(b) excludes delays resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel.[35] The calculation for a continuance begins the day after the continuance is granted and includes the day on which the continuance ends.[36] In the case of an indefinite continuance, the calculation runs from the day immediately following the grant of the continuance and ends when the defendant takes some affirmative action, such as requesting a trial date, to show his or her desire for the indefinite continuance to end or, absent such a showing, on the rescheduled trial date.[37]

[10-12] Under § 29-1208, if a defendant is not brought to trial before the running of the time for trial, as extended by excludable periods, he or she shall be entitled to his or her absolute discharge.[38] The burden of proof is upon the State to show that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months.[39] To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.[40]

3. Court Record

Two dates pertinent to our analysis are certain: December 8, 2003, the date on which the information was filed, and September 28, 2007, the date on which Williams filed the motion for discharge which is the subject of this appeal. Obviously, unless significant portions of the nearly 4-year

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[34] *Id.*

[35] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[36] See *State v. Blakeman*, 16 Neb. App. 362, 744 N.W.2d 717 (2008).

[37] See, *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

[38] See, *State v. Sommer, supra* note 2; *State v. Baker, supra* note 26.

[39] *State v. Sommer, supra* note 2.

[40] *Id.*

span between those dates constitute excludable periods under § 29-1207, the State's time in which to bring Williams to trial has expired. Our task in this appeal is to determine whether the district court erred in concluding that it had not. This task is made more difficult by the fact that the district court made only general findings. In its ruling on the initial motion for discharge, the court found that all prior trial dates "have all been continued at the request of the defendant for a variety of reasons" and that according to its unspecified calculations, "the six months speedy trial has not run." In ruling on the second motion, the motion at issue in this appeal, the court concluded that it was "well within the parameters" of the speedy trial statute. At the time of these rulings, neither the speedy trial statute nor our prior case law required more specific findings of excludable periods under § 29-1207(4)(a) and (b).

[13] We have required specific findings with respect to the excludable period under another provision of the speedy trial statutes. Section 29-1207(4)(f) provides that other periods of delay not specifically enumerated in the statute may be excluded in the speedy trial computation, "but only if the court finds that they are for good cause." In *State v. Alvarez*,[41] we held prospectively that in order to facilitate appellate review, trial courts must make specific findings with respect to § 29-1207(4)(f) "as to the cause or causes of such extensions and the period of extension attributable to such causes." We now conclude that similar findings are necessary in order to facilitate appellate review of all determinations of excludable periods under § 29-1207(4). Effective March 9, 2009, when ruling on a motion for absolute discharge pursuant to § 29-1208, the trial court shall make specific findings of each period of delay excludable under § 29-1207(4)(a) to (e), in addition to the findings under § 29-1207(4)(f) currently required by *Alvarez*. Such findings shall include the date and nature of the proceedings, circumstances, or rulings which initiated and concluded each excludable period; the number of days composing each excludable period; and the number of days remaining in

[41] *State v. Alvarez*, 189 Neb. 281, 292, 202 N.W.2d 604, 611 (1972).

which the defendant may be brought to trial after taking into consideration all excludable periods.

4. Resolution of Williams' Claim

In the absence of any excludable period, the 6-month period in which the State was required to bring Williams to trial would have begun on December 9, 2003, and ended on June 8, 2004.

(a) First Excludable Period: January 17 to July 8, 2004 (174 Days)

The parties agree that an excludable period under § 29-1207(4)(a) began with Williams' plea in abatement and a motion for discovery on January 16, 2004. They disagree as to when this period ended. Williams contends that it was on July 7, 2004, when the court overruled his plea in abatement. The State argues that the excludable period continued until October 22, 2004, the date of a journal entry ordering "'[m]utual and reciprocal discovery . . . pursuant to statute.'"[42] Williams argues that this entry was made long after the actual ruling on his discovery motion and could not extend the excludable period beyond July 7.

The record supports Williams' argument on this point. At a hearing on Williams' motion for discharge, a former district court bailiff testified that she made the October 22, 2004, journal entry which refers to "reciprocal discovery" and that it was made "for purposes of housekeeping" to reflect an order which had occurred previously at the time of arraignment. This testimony is consistent with the July 7 journal entry in which the court overruled the plea in abatement and further noted: "Nothing under advisement." Also, a motion for continuance filed by Williams on January 19, 2005, states that discovery had been completed and that the State had provided defense counsel with certain documents. The State did not prove by a preponderance of the evidence that the excludable period attributable to Williams' discovery motion and plea in abatement extended beyond July 7, 2004. Thus,

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[42] Brief for appellee at 14.

the first excludable period commenced on January 17, 2004, the day after the filing of the defense motions, and ended on July 8, 2004, the date the order was file stamped, a total of 174 days.

(b) Second Excludable Period: October 6, 2004, to August 14, 2006 (678 days)

On September 27, 2004, the district court entered an order setting the case for trial commencing on November 8. On October 5, Williams filed a motion for continuance. Williams filed other motions as well, and the trial was originally rescheduled to begin on February 7, 2005, "[b]y agreement of the parties." Williams filed additional motions for continuance and other motions in 2005 and 2006. He contends that these motions resulted in an excludable period of 614 days, ending on June 12, 2006, when a pretrial hearing was held and trial was set to commence on September 5.

We disagree with Williams' reasoning regarding the end of this excludable period. At a hearing on November 21, 2005, Williams' counsel made an oral motion for a continuance due to the continued unavailability of a key defense witness who resided in another state. Williams confirmed that he was asking for the continuance. Counsel could not provide a specific date when the witness would be available, but agreed to give the judge a "timeline" regarding the process of serving the witness with a subpoena in another state. The court granted the indefinite continuance. We agree with the reasoning of the Court of Appeals in *State v. Dailey*,[43] which was derived from our holding in *State v. Andersen*,[44] that when a defendant has sought and obtained an indefinite continuance, it is his or her affirmative duty to end the continuance by giving notice of request for trial. Otherwise, the court can end the continuance by setting a trial date or specifically ordering that the continuance has ended. When the court ends an indefinite continuance by setting a trial date, the excludable period resulting

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[43] *State v. Dailey*, *supra* note 37.

[44] *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

from the indefinite continuance ends on the date set for trial and not the date on which the trial date is set.[45]

We find no indication in the record that Williams took affirmative action to end the indefinite continuance prior to the court's order of June 12, 2006. Applying the foregoing reasoning, we conclude that the excludable period which began on the day immediately following the filing of Williams' initial motion for continuance on October 5, 2004, did not end on June 12, 2006, when the court set a trial date. Rather, the excludable period was ongoing as of August 14, when Williams filed a motion to dismiss on speedy trial grounds, thus commencing a third excludable period. We therefore conclude that the second excludable period began on October 6, 2004, and ended on August 14, 2006, a period of 678 days. Because the second and third excludable periods overlap, we include August 14, 2006, in our count of the number of days in the second excludable period only.

(c) Third Excludable Period: August 15 to 23, 2006 (9 days)

The district court treated the motion to dismiss filed by Williams on August 14, 2006, as a motion for absolute discharge on speedy trial grounds, and denied it on August 23, 2006. Counting August 15 as the first day of this period, it included 9 days.

(d) Fourth Excludable Period: August 25, 2006, to May 16, 2007 (265 days)

Williams filed his first notice of appeal on August 25, 2006. On May 10, 2007, the Court of Appeals issued its mandate affirming the denial of Williams' first motion for discharge. The district court first took action on the mandate on May 16 by scheduling a pretrial hearing for May 23, thus ending the fourth excludable period which comprised 265 days.

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[45] *State v. Dailey, supra* note 37. See, also, *State v. Schmader, supra* note 37.

(e) Fifth Excludable Period: June 5 to September 28, 2007 (116 days)

The record reflects that on May 23, 2007, the court continued the pretrial hearing to May 29, because both counsel were appearing in the same criminal trial before another judge of the same court. There is no indication that Williams specifically requested or consented to a continuance at this time. On May 29, Williams' counsel appeared at the rescheduled prehearing conference, but the prosecutor did not because she was in trial. The court continued the pretrial hearing to June 4. Again, the record does not indicate that Williams requested or consented to this continuance. None of this time is excludable.

Both counsel appeared on June 4, 2007, and the record indicates that the matter was continued to June 11 "on the motion of the Defense." A June 11 docket entry states that both counsel appeared and that the matter was continued "on the motion of the Defense so counsel to [sic] speak to Defendant about possible plea." The next docket entry, dated June 15, 2007, indicates that the pretrial hearing was continued to June 19 "on the motion of the Defense from 06/11/2007." A June 19 docket entry indicates that a pretrial hearing was held and that the matter was "continued for a jury trial commencing 10/01/2007" with another pretrial hearing set for September 18, 2007. The docket entry concludes: "Both continuances are on the motion of the Defense." Williams filed his second motion for discharge on September 28, 2007.

The record thus reflects that all continuances granted on and after June 4, 2007, were at Williams' request or with his consent. Thus, the 116-day period from June 5 to September 28, 2007, was excludable under § 29-1207(4)(b).

5. Summary

Based on the foregoing, there were 1,242 days of excludable time pursuant to § 29-1207(4)(a) and (b). Thus, the period in which the State could bring Williams to trial was extended from June 8, 2004, to November 2, 2007. Because there were 34 days remaining on the speedy trial clock when Williams filed his motion for discharge on September 28, 2007, the district court did not err in overruling the motion.

V. CONCLUSION

For the reasons discussed, we affirm our jurisdiction to resolve nonfrivolous interlocutory appeals from the denial of a motion for absolute discharge based on Nebraska's speedy trial statutes, and we affirm the judgment of the district court denying Williams' motion for discharge.

AFFIRMED.

WRIGHT, J., concurring.

In a criminal prosecution, the accused has the right to a trial within 6 months of the indictment or the filing of the information. See Neb. Rev. Stat. § 29-1207 (Reissue 2008). I have no problem with this requirement and would not overrule our prior decisions that permit an accused to assert this right prior to trial. See, *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

I write, however, to point out that the statutes relating to the right to a speedy trial are flawed and are subject to abuse. The present case illustrates this point.

Because of continuances granted at the accused's request or with his consent, trial has been postponed for years beyond the 6-month period. Following each continuance, the State must set another trial date to comply with the 6-month requirement. If the State does not try the accused within such period, the accused is entitled to an absolute discharge. See Neb. Rev. Stat. § 29-1208 (Reissue 2008). Similar to the crocodile that followed "Captain Hook," time keeps following the State, and the accused hopes the State will slip and fall victim to the 6-month trial clock.

The solution is not in overruling *Jacques* and *Gibbs*, but in amending the speedy trial statutes. If an accused extends the trial date beyond the required 6 months, then the accused should be deemed to have waived this 6-month trial requirement. The accused is still protected by the constitutional right to a speedy trial. The constitutional right and the statutory implementation of that right under § 29-1207 exist independently of each other. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

In the case at bar, the accused has postponed his trial for years and still asserts he was denied his statutory right to a

speedy trial. The information was filed December 8, 2003, and the accused has continued the trial from that date. One has only to read the opinion of this court to observe the mental gymnastics required to determine whether the State has slipped and fallen victim to the law.

I concur in the result, but point out that the law is flawed.

HEAVICAN, C.J., and CONNOLLY, J., join in this concurrence.

ANGUS GAREY ET AL., APPELLEES AND CROSS-APPELLANTS, V. NEBRASKA DEPARTMENT OF NATURAL RESOURCES ET AL., APPELLANTS AND CROSS-APPELLEES.

759 N.W.2d 919

Filed February 6, 2009. No. S-08-581.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Constitutional Law: Taxation: Property.** Neb. Const. art. VIII, § 1A, states that the State shall be prohibited from levying a property tax for state purposes.
3. ____: ____: ____. Neb. Const. art. VIII, § 1A, contains two aspects: First, the property tax at issue must be levied by the State, and second, the property tax at issue must be levied for a state purpose.
4. **Legislature: Political Subdivisions: Taxation: Property.** Where the Legislature has provided that a local political subdivision is authorized to levy property taxes for state purposes, it should not conclusively be considered as a local property tax levy merely because the levy is enforced by local authorities.
5. **Constitutional Law: Taxation: Property.** The State cannot circumvent the constitutional mandate of Neb. Const. art. VIII, § 1A, by converting the traditional state functions into local functions supported by property taxes.
6. **Statutes: Intent.** When state and local purposes are intermingled in a statute, the crucial issue is whether the controlling and predominant purposes are state purposes or local purposes.
7. **States: Federal Acts.** An interstate compact is agreed upon by the states, ratified by the state legislatures, and then ratified by the U.S. Congress, at which time it becomes the law of the United States.
8. **Constitutional Law: Taxation: Property.** A property tax in furtherance of compliance with an interstate compact is, for purposes of analysis under Neb. Const. art. VIII, § 1A, a property tax levied by the State for state purposes.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Jon Bruning, Attorney General, Justin D. Lavene, and Katherine J. Spohn for appellants Nebraska Department of Natural Resources et al.

Donald G. Blankenau and Thomas R. Wilmoth, of Husch, Blackwell & Sanders, L.L.P., for appellants Upper Republican Natural Resources District et al.

Jeanelle R. Lust, Rodney M. Confer, LeRoy W. Sievers, and Jocelyn W. Golden, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

Plaintiffs-appellees, who are residents and taxpayers of the Upper, Middle, and Lower Republican Natural Resources Districts of the State of Nebraska (NRD's), filed an action for declaratory and injunctive relief in the district court for Lancaster County alleging that a property tax levy authorized by § 11(1)(d) of 2007 Neb. Laws, L.B. 701, and found at Neb. Rev. Stat. § 2-3225(1)(d) (Reissue 2007) is unconstitutional. The district court concluded that the challenged provision was unconstitutional and entered an order granting declaratory judgment, severed the offending portion of L.B. 701, and enjoined defendants-appellants, who are various governmental agencies, from enforcing § 11(1)(d) of L.B. 701. Appellants appeal this decision, and appellees cross-appeal.

We conclude that the challenged property tax provision of L.B. 701 violates the prohibition found in Neb. Const. art. VIII, § 1A, against levying a property tax for a state purpose. Although the decision of the district court concluding that the challenged provisions of L.B. 701 were unconstitutional was based on different reasoning, we nevertheless affirm.

STATEMENT OF FACTS

Appellees in this case are residents and taxpayers of the NRD's. Defendant-appellant Department of Natural Resources

is an administrative department of the State and has jurisdiction over matters pertaining to water rights for irrigation, power, or other useful purposes. Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006). Defendants the NRD's are districts within the State; one of their purposes is the regulation of ground water within their respective districts. Neb. Rev. Stat. § 46-707 (Supp. 2007). The remaining appellants in this case are individuals and entities with the authority to impose and collect property taxes in the counties that make up the NRD's.

The following statement of facts, for which we find support in the record, comes largely from the facts outlined in the district court's order granting injunctive relief and enjoining appellants. The states of Colorado, Kansas, and Nebraska and the United States are party signatories to the Republican River Compact of 1943, 2A Neb. Rev. Stat. appx. § 1-106 (Reissue 2008) (Compact). The primary purposes of the Compact are to

> provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the "Basin") for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

Id., art. I at 1183.

Under the terms of the Compact, each signatory state is allotted an annual number of acre-feet of water for "beneficial consumptive use." *Id.*, art. IV at 1184. The specific allocations and the sources of those allocations are found in article IV of the Compact and provide that Colorado is to receive 11 percent of the annual allotment, Kansas is to receive 40 percent of the annual allotment, and Nebraska is to receive 49 percent of the annual allotment. As the district court noted, by entering into the Compact, Nebraska agreed to limit its consumption of water from the Republican River Basin to ensure

that downstream Kansas would receive its allotted share of the water.

In 1999, Kansas was allowed to file a bill of complaint with the U.S. Supreme Court alleging that Colorado and Nebraska were violating the Compact by using more than their allotted shares of the water supply. After a special master approved a settlement agreement among the parties without reservations, the case was settled, thereby dismissing any claims as of December 15, 2002. Among other things, the settlement established a procedure for measuring water usage using a computer model; allowed the use of allocated water anywhere in a state in normal years and, in Nebraska, anywhere upstream of Guide Rock in dry years; and provided that water imported into the Republican River Basin from another river basin can be considered as a credit against a state's computed beneficial consumptive uses.

In 2004, Nebraska's Governor and Attorney General informed the NRD's' water users that to comply with the settlement agreement, water consumption would need to be reduced in dry years, and that to ensure compliance with the Compact, the State could step in if the NRD's failed to control usage. In 2006 and 2007, the department leased or purchased surface water rights from the Bostwick Irrigation District to assist the State in meeting its obligations under the Compact.

On May 1, 2007, the Governor signed L.B. 701 into law. Section 11 of L.B. 701, at issue in this case, amended § 2-3225(1)(d) and (2), and the statute provides as follows:

> [(1)](d) In addition to the power and authority granted in subdivisions (a) through (c) of this subsection, a district with jurisdiction that includes a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin may annually levy a tax not to exceed ten cents per one hundred dollars of taxable valuation of all taxable property in the district for the payment of principal and interest on bonds and refunding bonds issued pursuant to section 2-3226.01. . . .
>
> (2) The proceeds of the tax levies authorized in subdivisions (1)(a) through (c) of this section shall be used,

> together with any other funds which the district may receive from any source, for the operation of the district. When adopted by the board, the tax levies authorized in subdivisions (1)(a) through (d) of this section shall be certified by the secretary to the county clerk of each county which in whole or in part is included within the district. Such levy shall be handled by the counties in the same manner as other levies, and proceeds shall be remitted to the district treasurer. Such levy shall not be considered a part of the general county levy and shall not be considered in connection with any limitation on levies of such counties.

On May 1, 2007, the office of the Nebraska Governor issued a press release stating that the passage of L.B. 701 created a cash fund which, among other things, could "be used to help the state continue to comply with interstate compacts and agreements." The press release went on to state that L.B. 701 provided $3 million to allow the department "to negotiate a one-year lease of surface water rights in the Bostwick Irrigation District to help the state comply with the . . . Compact." The record shows that prior to the enactment of L.B. 701, the State had purchased or leased these water rights.

In June 2007, the NRD's entered into an interlocal cooperation agreement creating the Republican River Basin Coalition (RRBC). The purpose of the RRBC is to

> provide the authority, resources, services, studies, and facilities needed for the representation of the interests of the [NRD's] in proceedings before all agencies, tribunals, courts, and any administrative, legislative, executive, or judicial bodies concerning or affecting the NRDs' actions, decisions, and policies to regulate/manage water to ensure the State of Nebraska remains in compliance with the . . . Compact . . . .

The agreement stated, "The RRBC shall specifically act within the authorities granted by LB 701 . . . ." The RRBC has entered into various agreements to lease water.

On September 13, 2007, letters were sent on behalf of appellees to each of the NRD's, formally requesting that the NRD's "vote not to levy any property taxes . . . sanctioned by

the Nebraska Legislature in L.B. 701, as a means of meeting Nebraska's commitment to comply with the . . . Compact." Nevertheless, in September 2007, the NRD's each adopted property tax levies authorized by L.B. 701.

In response to the levies, appellees filed this action seeking a declaratory judgment and alleging that the property tax levy found in L.B. 701 is unconstitutional and unenforceable. Appellees claim that the property tax levy in § 11(1)(d) of L.B. 701 represents a property tax levy for state purposes, in violation of Neb. Const. art. VIII, § 1A; results in a commutation of taxes, in violation of Neb. Const. art. VIII, § 4; and constitutes special legislation, in violation of Neb. Const. art. III, § 18.

After a trial on stipulated facts, the district court entered an order granting declaratory judgment and injunctive relief to appellees, concluding that although § 11(1)(d) of L.B. 701 does not violate Neb. Const. art. VIII, § 1A or § 4, it is special legislation, in violation of Neb. Const. art. III, § 18, and, therefore, unconstitutional. The district court concluded that pursuant to the severability provision of § 34 of L.B. 701, the court's ruling had no bearing on the remaining provisions of L.B. 701. The district court enjoined appellants from enforcing and implementing any property tax levy authorized by § 11(1)(d) of L.B. 701 and found at § 2-3225(1)(d). Appellants appeal, and appellees cross-appeal.

ASSIGNMENTS OF ERROR

Appellants appeal the decision of the district court which concluded that § 11(1)(d) of L.B. 701 is unconstitutional and granted declaratory and injunctive relief, and appellees cross-appeal, claiming that the district court erred when it concluded that L.B. 701 did not violate Neb. Const. art. VIII, §§ 1A and 4. In particular, on cross-appeal, appellees claim that the district court erred when it concluded that the property tax levy in § 11(1)(d) of L.B. 701 is not a property tax levy for state purposes, in violation of Neb. Const. art. VIII, § 1A. Because we find merit to this assignment of error on cross-appeal and our resolution of this assignment of error resolves this case, we do not reach the parties' remaining assignments of error.

STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *Stenger v. Dept. of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008).

ANALYSIS

In this case, the district court entered an order granting declaratory judgment and injunctive relief to appellees, concluding that although § 11(1)(d) of L.B. 701 does not violate Neb. Const. art. VIII, § 1A or § 4, it is special legislation in violation of Neb. Const. art. III, § 18. Appellants challenge the district court's determination that the complained-of portion of L.B. 701 is special legislation, in violation of Neb. Const. art. III, § 18. Appellees cross-appeal, challenging the district court's determinations that the complained-of portion of L.B. 701 does not violate either Neb. Const. art. VIII, § 1A, prohibiting a property tax levy for state purposes, or Neb. Const. art. VIII, § 4, dealing with improper commutation of taxes. We first address the issue raised in the cross-appeal claiming that the district court erred when it failed to conclude that § 11(1)(d) of L.B. 701 violated Neb. Const. art. VIII, § 1A. We conclude that § 11(1)(d) of L.B. 701 violates the prohibition against a property tax levy for state purposes contained in Neb. Const. art. VIII, § 1A, and therefore, we conclude that § 11(1)(d) of L.B. 701 is unconstitutional on this basis.

Under §§ 6(1) and 9 of L.B. 701, the NRD's are given the power to issue bonds for the purpose of acquiring ground water rights, surface water rights, or surface water storage rights to pay for the acquisition of canals and other works or for vegetation management. (L.B. 701, § 6(1), is codified at Neb. Rev. Stat. § 2-3226.01(1) (Reissue 2007); L.B. 701, § 9, is codified at Neb. Rev. Stat. § 2-3226.04 (Reissue 2007).) The NRD's can then repay the bond debt by, among other ways, imposing a property tax levy on all taxable property within the NRD's' districts. § 2-3225(1)(d). It is the constitutionality of the property tax levy found in § 2-3225(1)(d), originating in § 11(1)(d) of L.B. 701, that is challenged in this case.

[2,3] Neb. Const. art. VIII, § 1A, states that "[t]he state shall be prohibited from levying a property tax for state purposes." This constitutional provision contains two aspects: First, the property tax at issue must be levied by the State, and second, the property tax at issue must be levied for a state purpose. The purpose of this section was to require the State, after the adoption of state sales and income taxes, to leave the realm of property taxation for local purposes. *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996).

[4] With respect to our determination of whether a property tax is levied by the State, we have noted that where the Legislature has provided that a local political subdivision is authorized to levy property taxes for state purposes, it should not conclusively be considered as a local property tax levy merely because the levy is enforced by local authorities. See *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon*, 192 Neb. 201, 219 N.W.2d 454 (1974). In *Tallon*, we stated that "[t]o construe the constitutional amendment [at art. VIII, § 1A,] to prohibit only a direct statewide property tax levy by the State itself would emasculate the amendment and render it virtually meaningless and wholly ineffective." 192 Neb. at 212, 219 N.W.2d at 460.

[5,6] We have also explained that the State cannot circumvent the constitutional mandate of Neb. Const. art. VIII, § 1A, by "converting the traditional state functions into local functions supported by property taxes." *Swanson*, 249 Neb. at 476, 544 N.W.2d at 340. When state and local purposes are intermingled in a statute, the crucial issue is whether "the controlling and predominant purposes . . . are state purposes or local purposes." *Rock Cty. v. Spire*, 235 Neb. 434, 446-47, 455 N.W.2d 763, 770 (1990) (citing *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, supra*). There is no sure test for determining which state purposes may be distinguished from local purposes, and we have said that this court must consider each case as it arises and draw the line of demarcation. *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon, supra*.

In assessing § 11(1)(d) of L.B. 701 for constitutional analysis, we look to the legislative history, as did the district court.

See *Craig v. Board of Equalization*, 183 Neb. 779, 164 N.W.2d 445 (1969) (looking to legislative history of constitutional section when determining whether special levies imposed by statute serve state or local purpose). We have recently stated in the context of a special legislation analysis that "[g]enerally, outside of the plain language used in legislation, a legislative body's purpose or intent in enacting legislation is determined through an examination of the legislative history of a particular enactment." *Hug v. City of Omaha*, 275 Neb. 820, 824, 749 N.W.2d 884, 888 (2008).

In the instant case, it is clear from the legislative history that L.B. 701 has the purpose of ensuring the State's compliance with the Compact and additionally addressing the water problems of the Republican River Basin. The Introducer's Statement of Intent for L.B. 701 states that the bill "[p]rovide[s] a way to guarantee that Nebraska stays in compliance with the [Compact agreement] with Kansas on an annual basis" and that L.B. 701 "is designed to address the water problem in the Republican River Basin." Committee on Natural Resources, 100th Leg., 1st Sess. (Feb. 28, 2007).

Given this comment and others not repeated here, we conclude that the purposes of the property tax provisions found at § 11(1)(d) of L.B. 701 are intermingled state and local purposes. As we have done in previous cases in this area, our analysis and determination of whether the primary purpose of the property tax provisions in L.B. 701 is a state purpose or a local purpose address both aspects in the constitutional amendment at issue: i.e., whether the property tax was levied by the State and whether it was levied for a state purpose. See, *Rock Cty. v. Spire*, *supra*; *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon*, 192 Neb. 201, 219 N.W.2d 454 (1974).

In its order, the district court concluded that L.B. 701 does not violate Neb. Const. art. VIII, § 1A, because the predominant purpose of the challenged property tax levy authorized by L.B. 701 is to meet a local purpose. The district court stated that "[t]hrough LB 701, the population of the Republican River Basin can use the tax levy option, if it desires, to meet its agricultural goals, while, at the same time, assisting the state in

complying with the Compact." Given the stipulated facts and applicable law, we disagree with the district court's assessment and conclude, as a matter of law, that the property tax levy in L.B. 701 is effectively a state levy and that its primary purpose is for a state purpose. We, therefore, conclude that the property tax levy, § 11(1)(d) of L.B. 701, violates Neb. Const. art. VIII, § 1A.

In determining that the property tax at issue is primarily for state purposes, we note that the legislative history, some of which is quoted by the district court in its order, is replete with testimony that the predominant purpose of the property tax provision of L.B. 701 is for the purpose of maintaining the State's compliance with the Compact. The following are certain examples of comments from the legislative hearing on L.B. 701 which inform our decision and lead us to conclude that § 11(1)(d) of L.B. 701 had as its controlling purpose compliance with the Compact:

> DAN SMITH[,] manager of the Middle Republican Natural Resources District[:] . . . [W]ith the funds proposed for [the department, w]e have the opportunity to purchase water from four different irrigation districts and help Nebraska achieve its first year of compliance since the settlement was approved. This new authority to generate fund[s] from bonds for a variety of groundwater management activities and some actions that will be relevant to [C]ompact compliance . . . can only be good for Nebraska. . . .
>
> . . . .
>
> MIKE CLEMENTS[,] manager of the Lower Republican [Natural Resources District:] . . . There is no simple fix for the issues facing the Republican Basin. LB701 does, however, provide additional tools that can be coupled with our existing controls that can be used to help us work towards [C]ompact compliance. . . .
>
> . . . .
>
> JASPER FANNING[,] manager of the Upper Republican Natural Resources District[:] . . . But at the end of the day, we have a plan that we feel can get us and keep us in compliance with this compact so that we can continue

> to irrigate in the basin. . . . But at the end of the day, we need enough total funds available to pay the cost that it's going to take to keep us in compliance so that we can minimize the economic impact of the [C]ompact on the basin. . . .
>
> . . . .
>
> ANN BLEED[,] director of the [d]epartment[:] . . . I believe that passage of this bill will be extremely helpful in allowing the state and the natural resources districts to do what is necessary to comply with the . . . Compact. . . . The bill, in providing authority for the natural resources districts to issue bonds, fees, or property tax levies, will provide valuable and, I believe, necessary tools to natural resources districts so that they can fairly share responsibility for [C]ompact compliance.

Committee on Natural Resources Hearing, L.B. 701, 100th Leg., 1st Sess. 397-434 (Apr. 4, 2007).

The plain language of § 2-3225 also suggests that the primary purpose of the property tax provision of L.B. 701 is to ensure compliance with the Compact. The provision's authority to tax is narrow, and the funds received, curiously, do not appear to be specifically available for the operation of the districts.

The language of § 11(1)(d) of L.B. 701 grants property taxing authority only to those districts with a jurisdiction which includes "a river subject to an interstate compact among three or more states and that also includes one or more irrigation districts within the compact river basin." (Emphasis omitted.) See § 2-3225(1)(d). On its face, § 2-3225 narrows the applicability of the taxing authority and, according to the record, includes only those districts which are appellants in this case. Further, § 2-3225(2) provides that tax levies authorized and raised in § 2-3225(1)(a) through (c) shall be used "for the operation of the district," but the tax levy at issue in the instant case which is authorized under (1)(d), is, on the face of the statute, excluded from being used for the operation of the district. The failure to include property taxes raised under § 2-3225(1)(d) from being used for the operation of the district suggests that such revenue will be channeled elsewhere, arguably to meet

the expenses associated with the State's obligation to comply with the Compact. Based on the legislative history and the plain language of the statute, we conclude that the controlling and predominant purpose behind the property tax provision in § 11(1)(d) of L.B. 701 is for the purpose of maintaining compliance with the Compact, which we conclude is a state purpose.

[7] Indeed, an interstate compact, such as the one at issue in this case, is agreed upon by the states, ratified by the state legislatures, and then ratified by the U.S. Congress, at which time it becomes the law of the United States. See, Compact; U.S. Const. art. I, § 10. See, also, *Texas v. New Mexico*, 482 U.S. 124, 107 S. Ct. 2279, 96 L. Ed. 2d 105 (1987). If an action is brought to enforce the Compact, such action would be an original action before the U.S. Supreme Court and that court could enter an order instructing a party to the Compact to comply with its terms and award damages for noncompliance. See *Texas v. New Mexico, supra* (explaining that compact is legal document and must be construed and applied in accordance with its terms). The Supreme Court has stated that the proper plaintiff in a case involving a compact is the state. See *id.*

The Compact was signed by the State, and the special master overseeing the settlement agreement stated:

> [T]he Compact is self-executing. . . . [A] State has an enforceable legal obligation to comply with the Compact, which constitutes the law of the United States as well as of all three compacting States. If a State fails to meet that obligation, it is subject to liability for breach of the Compact.

Kansas v. Nebraska, No. 126 Original, Second Report of the Special Master, appx. D3 at D3-26 to D3-27 (2003), http://www.supremecourtus.gov/SpecMastRpt/ORG126_4162003.pdf (last visited Feb. 2, 2009).

[8] The State has acknowledged that compliance with the Compact is the State's responsibility by entering into the final settlement stipulation resolving the litigation which was initiated by the State of Kansas in 1998. Further, prior to the enactment of L.B. 701, it was the State rather than local

entities which leased or purchased surface water rights from the Bostwick Irrigation District to further compliance with the Compact. Neither the department nor the individual NRD's were parties or signatories to the Compact or the settlement. The State is obligated to comply with the Compact, and a property tax in furtherance of compliance is, for purposes of analysis under Neb. Const. art. VIII, § 1A, a property tax levied by the State for state purposes.

CONCLUSION

We conclude that L.B. 701(1)(d) violates the prohibition against levying a property tax for state purposes found in Neb. Const. art. VIII, § 1A, and that such provision is therefore unconstitutional. Under § 34 of L.B. 701, we sever the offending provision and our ruling has no bearing on the remaining provisions of L.B. 701. Because of our resolution of this case, we need not consider the remaining assignments of error. See *Papillion Rural Fire Prot. Dist. v. City of Bellevue*, 274 Neb. 214, 739 N.W.2d 162 (2007). Although our reasoning differs from that of the district court, which also concluded that § 11(1)(d) of L.B. 701 was unconstitutional, albeit on another basis, see *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005), we affirm the order of the district court, which declared § 11(1)(d) of L.B. 701 unconstitutional and enjoined its enforcement.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
PERRY D. DAVIS, APPELLANT.
762 N.W.2d 287

Filed February 13, 2009. No. S-08-316.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

2. ____: ____: ____: ____. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.
3. **Testimony: Time: Proof.** Since 1989, the State has not been required to corroborate a victim's testimony in cases of first degree sexual assault; the victim's testimony alone is sufficient if believed by the finder of fact.
4. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
6. **Criminal Law: Appeal and Error.** An appellate court's standard of review for criminal cases requires substantial deference to the factual findings made by the jury.
7. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
8. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
9. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Sheridan County: BRIAN C. SILVERMAN and RANDALL L. LIPPSTREU, Judges. Affirmed as modified.

P. Stephen Potter and Barbara Brogan for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

In September 2007, a jury convicted Perry D. Davis of one count of first degree sexual assault and one count of sexual assault of a child. In March 2008, the district court sentenced him to 20 to 30 years' imprisonment for first degree sexual assault and 4 to 5 years' imprisonment for sexual assault of a

child and the court ordered the sentences to run consecutively. Davis makes two arguments: The State failed to produce sufficient evidence to support the convictions, and the district court erred in imposing excessive sentences. We disagree and affirm as modified.

II. BACKGROUND

In 1992, Davis lived in Chadron, Nebraska, and began a relationship with the victim's mother who lived in Rushville, Nebraska. Against this background, the record reflects that Davis started to sexually assault the victim when she was age 4. The first incident occurred while Davis, his children, the victim, and her two brothers were driving on a county road between Hay Springs, Nebraska, and Chadron. Davis' son, who was 12 at the time, was driving because Davis was drinking. Davis was riding in the front passenger seat, with his daughter sitting on his lap. The victim was sitting on the console between the driver's seat and the passenger's seat. Davis asked the girls to switch places so that the victim could sit on his lap.

The victim testified that once she was sitting on his lap, Davis put his arms around her, put his hand up her dress, and inserted his fingers into her vagina. The victim told Davis to stop and attempted to pull away because it hurt, but Davis told her to sit still. Although Davis' daughter was sitting right next to her, the victim testified that she did not believe anyone could see what Davis was doing. After the car got a flat tire and stopped, the victim's younger brother asked if she was crying. The victim did not tell her brother what happened, and, after the tire was fixed, the victim got into the back seat. The victim did not tell anyone about the incident until she was 14. Davis denies it occurred.

The victim testified that the next incident happened when she was 9 or 10. She was sleeping in her mother's bed and, upon waking up, realized that Davis had pulled up her shirt and was caressing her body. He was rubbing her stomach, her arms from the shoulders down to the hands, and her legs from the ankles to the inner thighs. The victim testified that the rubbing continued for 5 or 10 minutes and ended when

she got up and went to the bathroom. Davis denied that this episode occurred.

In another incident, the victim testified that when she was 12, she was lying in her bed when Davis came into her room and began rubbing her buttocks. Davis took off the victim's pants and underwear, took his own pants off, and climbed into bed with her. The victim said, "'What are you doing?'" and then she felt Davis' penis on her leg. Davis did not insert his penis, but he did insert his fingers into her vagina. The victim got scared, started crying, and ran to the bathroom. At trial, the victim testified that during this incident, Davis penetrated her vagina with his fingers. Previously, however, the victim had told an investigator that no penetration occurred during this incident.

The victim did not tell anyone about any of these incidents until she was 14, when she told a friend. The victim told her mother about the abuse for the first time in March 2006, when she was 17. Her mother confronted Davis with the victim's accusations, and he denied them. Davis continued to live with the victim's family periodically during the summer of 2006.

The victim testified that in July or August 2006, she confronted Davis. When Davis was standing in her family's kitchen with her mother and her two brothers, the victim grabbed a knife, held it to Davis' neck, and threatened to stab him if he did not tell the truth about the assaults. The victim eventually put the knife down, at which point Davis said that the victim was lying to get attention. The victim's mother testified that the victim then started hitting and kicking Davis and that one of the victim's brothers had to take Davis home. Later, Davis called the victim's mother and told her that if they pressed charges against him, he would kill himself.

In the fall of 2006, the victim reported the sexual abuse to the guidance counselor at her school. The victim was pregnant at the time and testified that she was worried that Davis would be a threat to her child. At trial, Davis testified that he never had any inappropriate contact with the victim. The jury convicted Davis of one count of first degree sexual assault and one count of sexual assault of a child.

III. ASSIGNMENTS OF ERROR

Davis assigns, consolidated and restated, that there was insufficient evidence to support his convictions and that the district court erred in imposing excessive sentences.

IV. STANDARD OF REVIEW

[1,2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1] And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.[2] In summary, a defendant that asserts an insufficiency of the evidence claim has a steep hill to climb.

V. ANALYSIS

1. Sufficiency of Evidence

(a) First Degree Sexual Assault

In February 2007, the State charged Davis with first degree sexual assault "on or about February 24, 1993, to February 24, 2002." In 1993, when this offense initially occurred, a person committed first degree sexual assault if they subjected "another person to sexual penetration [when] the actor is nineteen years of age or older and the victim is less than sixteen years of age."[3] Sexual penetration included

> sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes.[4]

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[1] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[2] *Id.*; *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[3] Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989).

[4] Neb. Rev. Stat. § 28-318(6) (Reissue 1989).

[3] Davis first contends that the evidence is insufficient to support his conviction for first degree sexual assault. He argues that the State failed to present corroborating evidence and that the victim's testimony is not credible. This argument conflicts with Nebraska's penal statutes. Davis apparently overlooks the 1989 enactment of Neb. Rev. Stat. § 29-2028 (Reissue 1995). Since 1989, the State has not been required to corroborate a victim's testimony in cases of first degree sexual assault.[5] So, the victim's testimony alone is sufficient if believed by the finder of fact. Davis' argument fails.

[4-6] Davis' second claim, that the victim's testimony was unreliable, also fails. Remember, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.[6] A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.[7] Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.[8] And our standard of review for criminal cases requires substantial deference to the factual findings made by the jury.[9]

The victim testified that when she was 4, Davis digitally penetrated her vagina while riding in a vehicle with other family members. Because there was sexual penetration, the incident fulfills all the elements of first degree sexual assault. While Davis denied these allegations, a jury determined otherwise. We conclude the State presented sufficient evidence to prove the first degree sexual assault conviction beyond a reasonable doubt.

(b) Sexual Assault of a Child

Davis also contends that the record lacks sufficient evidence to support his conviction for sexual assault of a child.

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[5] See 1989 Neb. Laws, L.B. 443 (effective Mar. 15, 1989).

[6] See *Davis*, *supra* note 1.

[7] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[8] *State v. Ramsay*, 257 Neb. 430, 598 N.W.2d 51 (1999).

[9] See, *Davis*, *supra* note 1; *Iromuanya*, *supra* note 2.

He argues that the statute required the State to prove that the victim experienced "'serious personal injury'" because of the assault.[10] We disagree. Davis' argument presents an issue of statutory construction, and if the language of a statute is clear, the words of the statute are the end of our inquiry.[11]

A person commits sexual assault of a child if he or she subjects another person 14 years of age or younger to sexual contact and the actor is at least 19 years of age or older.[12] Section 28-318(5) defines sexual contact to mean

> the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

Intimate parts mean the genital area, groin, inner thighs, buttocks, or breasts.[13]

Simply put, we see nothing in § 28-318(5) or § 28-320.01(1) that shows a serious personal injury was a statutory element when Davis committed his crime. Thus, his serious personal injury argument also fails.

2. The District Court Committed Plain Error With the Sentence Imposed on Count II

The district court sentenced Davis to 4 to 5 years' imprisonment for his conviction of sexual assault of a child. Before July 1998, sexual assault of a child, as defined in § 28-320.01, was a Class IV felony.[14] In 1998, the Legislature reclassified

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[10] Brief for appellant at 11.

[11] See *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

[12] Neb. Rev. Stat. § 28-320.01(1) (Cum. Supp. 1992).

[13] § 28-318(2).

[14] See § 28-320.01 (Cum. Supp. 1996).

it as a Class IIIA felony.[15] Thus, during the applicable timeframe—February 1993 to February 2002—sexual assault of a child was both a Class IV and a Class IIIA felony. Because the State clearly charged and convicted Davis of the crime as a Class IV felony, we will review his sentence as a Class IV felony.

Although not raised in Davis' brief, the State brings to our attention that during the applicable timeframe, the Legislature amended the Class IV felony sentencing statutes. Before July 1998, Davis' indeterminate sentence of 4 to 5 years' imprisonment for a Class IV felony conviction was a valid sentence. As of July 1998, however, the minimum portion of an indeterminate sentence imposed on a Class IV felony cannot exceed one-third of the maximum term provided by law; i.e., no more than 20 months' imprisonment.[16] Thus, during the applicable timeframe, the Legislature shortened the maximum minimum sentence for a Class IV felony.

In *State v. Urbano*,[17] we analyzed the effect of a change in a sentencing statute after the criminal act was committed but before a final judgment is entered. We concluded that "where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically indicated otherwise."[18] In this case, there is not a final judgment until the entry of a final mandate by this court.[19]

The charges filed against Davis and the jury instructions state that these crimes began before 1998. So, Davis is entitled to the benefit of the amendment, because the criminal statute was amended after the criminal act but before a final judgment.

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[15] Compare § 28-320.01 (Cum. Supp. 1992 & Cum. Supp. 1996) with § 28-320.01(3) (Cum. Supp. 1998).

[16] Neb. Rev. Stat. § 29-2204(1)(a)(ii)(A) (Reissue 2008).

[17] *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999).

[18] *Id.* at 206, 589 N.W.2d at 154.

[19] See *id*. See, also, *State v. Gale*, 265 Neb. 598, 658 N.W.2d 604 (2003).

We modify the minimum portion of Davis' sentence so that it does not exceed the maximum minimum permitted by law for a Class IV felony indeterminate sentence.[20] Thus, we modify Davis' sentence to a term of 20 months' to 5 years' imprisonment.

3. Excessive Sentences

Finally, Davis argues that his sentences are excessive. A jury convicted Davis of first degree sexual assault, a Class II felony under § 28-319. Neb. Rev. Stat. § 28-105 (Reissue 2008) provides that a Class II felony is punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. The sentence of 20 to 30 years' imprisonment on that conviction was within the statutory range of 1 to 50 years' imprisonment. Davis was also convicted of sexual assault of a child, a Class IV felony.[21] Under the amended sentencing guidelines, a Class IV felony is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both, and has no minimum sentence.[22] Davis' modified sentence of 20 months' to 5 years' imprisonment is within the statutory range.

[7-9] Because the sentences imposed on Davis fall within the statutory sentencing limits, we review the sentences for an abuse of discretion.[23] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[24] The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[25] We have listed factors that control any sentence imposed by the district court:

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[20] See *Urbano*, *supra* note 17. See, also, *State v. Hedglin*, 192 Neb. 545, 222 N.W.2d 829 (1974).

[21] § 28-320.01(2) (Cum. Supp. 1992).

[22] See §§ 28-105 and 29-2204(1)(a)(ii)(A).

[23] See *Davis*, *supra* note 1.

[24] *Id.*; *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[25] *Id.*; *Iromuanya*, *supra* note 2.

> "In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime."[26]

Furthermore, the seriousness of the offense is an important factor in the setting of a sentence.[27] Considering all relevant factors, we conclude that the sentences are not an abuse of discretion.

Davis has an extensive criminal record that dates back to 1975. He has numerous convictions as an adult, most of which involve alcohol. Davis has been incarcerated for three of those convictions. He was imprisoned for two separate 30-day sentences in Nebraska for driving under the influence and was imprisoned for 18 months in South Dakota for his third driving under the influence offense in that state.

Davis was in his early thirties at the time he began sexually assaulting the victim when she was 4 years old. He continued to assault her until she was 12 years old. Although the victim did not suffer permanent physical injury, she no doubt has endured and will continue to endure psychological trauma throughout her life. While reports indicate that Davis is at low risk for recidivism, the district court correctly concluded that any sentence less than incarceration would promote disrespect for the law and depreciate the seriousness of Davis' acts.

VI. CONCLUSION

We conclude that the sentence imposed by the trial court for the first degree sexual assault conviction is not an abuse of discretion. We also conclude that Davis' sentence for sexual assault of a child, as modified, is not an abuse of discretion.

AFFIRMED AS MODIFIED.

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[26] *Davis*, *supra* note 1, 276 Neb. at 763, 757 N.W.2d at 374-75.

[27] *State v. Riley*, 242 Neb. 887, 497 N.W.2d 23 (1993).

KAREN A. BISHOP, APPELLANT, V. SPECIALITY FABRICATING CO., A CORPORATION, APPELLEE.

760 N.W.2d 352

Filed February 13, 2009. No. S-08-527.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
4. **Workers' Compensation.** When a worker sustains a scheduled member injury and a whole body injury in the same accident, the Nebraska Workers' Compensation Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must consider whether the scheduled member injury adversely affects the worker such that the loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability.
5. ____. When a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body impairment. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity. To allow both awards creates an impermissible double recovery.

Appeal from the Workers' Compensation Court. Affirmed.

James F. Fenlon, P.C., for appellant.

Bradley D. Shidler, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This appeal from the Nebraska Workers' Compensation Court raises the issue of whether a scheduled member injury may be separately compensated when it causes a psychological injury for which the worker receives nonscheduled benefits based upon loss of earning power. We agree with the compensation court that a separate award is not permitted in these circumstances.

BACKGROUND

Karen A. Bishop was employed by Speciality Fabricating Co. (Speciality) at the time of her injury on April 29, 2003. A grinder she was using to bore a hole in an I-beam slipped and cut her left wrist, injuring a tendon and nerve. Bishop underwent two surgical procedures to repair damage caused by this scheduled member injury.[1]

After being released for work by her physician, Bishop returned to her job at Speciality but experienced difficulty working around industrial machinery. She testified that any noise from the machinery made her heart palpitate and that some noises caused her to run outside and cry. Bishop left Speciality early on September 12, 2003, and never returned.

During a September 23, 2003, appointment with her surgeon, Bishop expressed anxiety about her ability to perform her duties at work and mentioned she had considered seeing a psychiatrist to discuss her concerns. Her surgeon referred her to a university psychiatry department, where she was diagnosed with posttraumatic stress disorder (PTSD) and situational anxiety and depression. Dr. William Marcil, an Omaha psychiatrist, treated Bishop. In Marcil's opinion, given with a reasonable degree of medical certainty, Bishop had a 25-percent permanent impairment of the body as a whole resulting from these mental conditions.

Bishop underwent vocational rehabilitation and completed an associate degree program to become a drafting technician. She was hired by Nebraska Boiler, located in Lincoln, and paid $14 per hour. Bishop found, however, that if she was exposed

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[1] See Neb. Rev. Stat. § 48-121 (Reissue 2004).

to industrial noises in the production shop for more than 5 minutes, she became nervous and occasionally cried. Because of this, Bishop quit her job at Nebraska Boiler on August 18, 2006. She moved to Missouri, where she was employed at the time of the trial as a receptionist and secretary, earning $11 per hour.

Prior to trial, Bishop received a 22-percent impairment rating on her left arm and was paid $12,285.74 in permanent partial disability benefits for this scheduled member injury. Two experts evaluated her loss of earning capacity. Gloria Bennett, a court-appointed counselor, concluded that Bishop had sustained a 12-percent loss of earning power, after considering the mental and physical restrictions resulting from both injuries. Richard Metz, a vocational rehabilitation counselor hired by Bishop, found that Bishop sustained a 20- to 24-percent loss of earning power. Metz' assessment was made after Bishop completed vocational rehabilitation.

Metz relied in part upon the evaluations of Marcil. According to Marcil, Bishop has a 25-percent permanent impairment of the body as a whole due to the fear of operating power tools and machinery that Bishop developed after her April 29, 2003, accident. In August 2006, Marcil gave Bishop work restrictions which precluded her from using power tools. She was also restricted from working on assembly lines, at manufacturing or production shops, or in any other areas where there was machinery noise.

The trial judge determined that Bishop experienced a 35-percent permanent loss of earning power, which entitled her to $111.60 per week for 173⅗ weeks, less credit for permanent indemnity paid on the scheduled member impairment in the amount of $12,285.74. Citing *Madlock v. Square D Co.*,[2] the court noted that "[w]hen a whole body injury (anxiety, PTSD) is the result of an accident and injury to a scheduled member and the two are combined to determine permanent loss of earning power, the plaintiff is not entitled to a separate, additional award for the member injury."

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[2] *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005).

Bishop applied for review of this determination, assigning as error that the court failed to award benefits for a 20-percent loss of use of her left arm. The review panel affirmed, finding that the trial court took into account the impairments and restrictions to Bishop's left arm when it determined her loss of earning power.

ASSIGNMENTS OF ERROR

Bishop assigns, consolidated and restated, (1) that the court's award failed to satisfy a rule of the Nebraska Workers' Compensation Court requiring the trial judge to specify the evidence upon which he or she relies and issue an opinion which affords a basis for meaningful appellate review, (2) that the court erred in concluding that her permanent loss of earning power based on PTSD and depression could not be fairly and accurately assessed without considering the impact of the scheduled member injury upon her employability, and (3) that the court erred in failing to award additional disability benefits for Bishop's scheduled member injury.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[3]

[2,3] Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[4] In testing the sufficiency of the evidence to support the findings

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[3] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007); *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006).

[4] *Money v. Tyrrell Flowers*, *supra* note 3.

of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[5]

ANALYSIS

Contrary to Bishop's contention, the trial judge issued a reasoned opinion specifying the evidence upon which he based the award. The court considered the evaluations performed by Bennett and Metz but found that both were deficient in that they did not take into account Bishop's inability to maintain her employment at Nebraska Boiler due to her recurrent, increased anxiety caused by proximity to industrial machinery. The court concluded that it could properly consider this evidence as a part of the totality of the evidence presented at trial in arriving at its conclusion that Bishop experienced a 35-percent permanent loss of earning power. The trial judge also made specific findings that Bishop's situational depression and PTSD resulted from her scheduled member injury and that permanent loss of earning power could not be fairly and accurately assessed without considering the impact of the scheduled member injury. These findings are sufficient for us to engage in meaningful appellate review, which includes an assessment of whether there is sufficient competent evidence to support the award.[6]

Bishop does not challenge the trial court's finding that she sustained a 35-percent loss of earning capacity, a higher rating than that given by either Bennett or Metz. She takes issue only with the court's determination that Speciality should receive a credit in the amount of the permanent indemnity benefits which it had previously paid on the scheduled member injury. In other words, Bishop contends that the court erred in not separately

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[5] See *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), citing *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[6] See Workers' Comp. Ct. R. of Proc. 11(A) (2009).

compensating her for the scheduled member and whole body injuries. In *Zavala v. ConAgra Beef Co.*[7] and *Madlock v. Square D Co.*,[8] this court examined the compensability of a scheduled member injury and an injury to the body as a whole sustained in the same accident.

[4] In *Zavala*, a worker sustained a scheduled member injury to her right arm and a whole body injury to her back in the same industrial accident. Noting that the Nebraska Workers' Compensation Act does not specifically address how compensation is to be established in this circumstance, this court concluded that when a worker sustains a scheduled member injury and a whole body injury in the same accident, the act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. We held that in making such an assessment, the court must consider whether the scheduled member injury adversely affects the worker such that the loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. We remanded the cause to the compensation court for further consideration in light of that holding, but did not address "the issue of whether a separate award for the scheduled member injury is permitted when considering the scheduled member injury with the whole body injury in the assessment of the loss of earning capacity."[9]

That issue was before us in *Madlock*. There, the worker sustained a scheduled member injury to her foot which altered her gait and resulted in a low-back condition. The trial judge considered the scheduled member injury in determining the loss of earning power caused by the back injury, but made separate awards for each. A review panel of the Workers' Compensation Court concluded that the trial judge had properly considered the impact of the member injury in awarding loss of earning capacity but erred in making a separate award for the member

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[7] *Zavala v. ConAgra Beef Co.*, *supra* note 5.

[8] *Madlock v. Square D Co.*, *supra* note 2.

[9] *Zavala v. ConAgra Beef Co.*, *supra* note 5, 265 Neb. at 200, 655 N.W.2d at 702.

injury. In the worker's appeal, we framed the issue as a question of law: "whether a worker may recover benefits for both a scheduled member injury and a whole body injury resulting in loss of earning capacity when the member injury was taken into consideration in determining the loss of earning capacity."[10] After examining authority from other jurisdictions, we concluded that the whole body injury could not be separated from the scheduled member injury because both arose from the same accident and that if the worker had not sustained the scheduled member injury to her foot, she would not have sustained the injury to her back which entitled her to benefits for loss of earning capacity. We reasoned that under these circumstances, the trial court was required to consider the scheduled member injury in awarding benefits because the loss of earning capacity could not be fairly and accurately assessed without such consideration. Referring to the scheduled member injury as "an essential factor" in determining the loss of earning capacity award, we concluded that the review panel correctly determined that by allowing a separate award for the scheduled member injury, the trial court had awarded a greater recovery than that to which the worker was entitled.[11]

[5] Bishop argues that this case is distinguishable from *Madlock* because her scheduled member injury was not an "essential factor" with respect to her whole body impairment resulting from PTSD and depression. Specifically, she argues that because her wrist injury was not "required for the continued existence of her mental and emotional restrictions"[12] in the same sense as the foot injury and resulting gait impairment were linked to the back injury in *Madlock*, she was entitled to a separate award for the scheduled member injury. This argument focuses too narrowly on the "essential factor" language in *Madlock* and ignores what precedes and follows that phrase. Read in context, the phrase "essential factor" as used in *Madlock* pertains to causation. In this case, as in *Madlock*, both

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[10] *Madlock v. Square D Co.*, *supra* note 2, 269 Neb. at 679, 695 N.W.2d at 415.

[11] *Id.* at 682, 695 N.W.2d 418.

[12] Brief for appellant at 13 (emphasis omitted).

the scheduled member injury and the whole body injury arose from the same accident. If Bishop had not injured her wrist, she would not have sustained a compensable psychological injury inasmuch as a work-related injury caused by a mental stimulus is not compensable.[13] The trial judge made a specific finding that "but for [Bishop's] accident and scheduled member injury she would not have experienced the PTSD and depression," and there is competent evidence to support this finding of causation. Therefore, this case presents the same factual circumstances held in *Madlock* to require the compensation court to consider the scheduled member injury in awarding benefits for loss of earning capacity. When a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body impairment. Under such circumstances, the trial court should not enter a separate award for the member injury in addition to the award for loss of earning capacity. To allow both awards creates an impermissible double recovery.[14]

CONCLUSION

The trial judge issued a reasoned opinion which included factual findings supported by competent evidence. By considering Bishop's scheduled member injury in determining Bishop's loss of earning capacity, but not awarding separate benefits for the scheduled member injury, the trial judge correctly applied the law as stated in *Zavala* and *Madlock*. We therefore affirm the judgment of the review panel which affirms the award.

AFFIRMED.

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[13] See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

[14] *Madlock v. Square D Co.*, *supra* note 2.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIS G. YOESEL, RESPONDENT.

760 N.W.2d 931

Filed February 20, 2009. No. S-07-1192.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent Willis G. Yoesel. The court accepts respondent's surrender of his license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 27, 1972. On June 30, 2008, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent.

The formal charges filed on June 30, 2008, allege that on November 26, 2002, on behalf of Dorothy M. Muse, respondent filed in the county court for Richardson County an application for informal probate of will and appointment of personal representative in the estate of Paul E. Jorn, Sr. On November 27, letters of personal representative were issued to Muse. Notice of the estate proceedings was published and thereafter numerous creditor claims were filed against the estate.

An inventory in the Jorn estate was not timely filed, and on May 19, 2003, the county court issued an order to show cause regarding the estate. The county court held a show cause hearing on June 11. At the hearing, the county court directed the personal representative to file an inventory by June 30. On July 8, respondent filed a short form inventory listing property individually owned by Jorn and property jointly owned by Jorn and Muse.

On March 10, 2005, the county court issued another order to show cause regarding the Jorn estate. A show cause hearing was held and the court directed the personal representative to file estate closing documents by May 31. Respondent failed to file the closing documents by May 31 and failed to inform the court why he could not timely file the documents.

On September 14, 2006, the court entered another order to show cause, and the show cause hearing was set for October 25. Respondent failed to attend the hearing. The hearing was rescheduled for December 6. At the hearing, the personal representative was directed to file closing papers and a proposed schedule of distribution by January 16, 2007. Respondent again failed to timely file any closing documents.

On February 14, 2007, the court issued another show cause order setting a show cause hearing for March 19. Again, respondent failed to attend the hearing. The court gave the personal representative until March 28, to hire a replacement counsel to complete the estate. Muse hired new counsel on March 27.

On April 6, 2007, Counsel for Discipline received a grievance letter from Muse regarding the respondent. Muse alleged that she hired respondent in 2002 to handle the probate of the estate of Jorn but that respondent had not timely handled the estate proceedings, failed to attend one or more hearings, failed to timely provide Muse with her file materials so that she could give them to her replacement attorney, and failed to refund the unused portion of the advance she paid to respondent in 2002. A copy of Muse's grievance letter was mailed to respondent on April 9, 2007.

The Counsel for Discipline made repeated inquiries to respondent for information concerning Muse's grievances. Respondent failed to provide all the information requested by the Counsel for Discipline. In the formal charges filed against respondent, the Counsel for Discipline alleges that respondent violated his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2007), and for the acts that occurred prior to September 1, 2005, respondent violated the following provisions of the Code of Professional Responsibility:

Canon 1, DR 1-102 (misconduct); Canon 6, DR 6-101 (failing to act competently); and Canon 9, DR 9-102 (preserving identity of funds and property of client). The formal charges further allege that for respondent's actions that occurred after September 1, 2005, he violated the following provisions of what are now codified as Neb. Ct. R. of Prof. Cond.: §§ 3-501.3 (diligence), 3-501.15 (safekeeping property), and 3-508.4 (misconduct).

Respondent answered the formal charges on September 22, 2008, and on October 9, this court appointed a referee. On December 19, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent stated that, for the purpose of his voluntary surrender of license, he knowingly does not challenge or contest the truth of the allegations in the formal charges. In addition to surrendering his license, respondent voluntarily consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him in the formal charges. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent voluntarily has stated that he knowingly does not challenge or contest the truth of the allegations in the formal charges that he failed to address client matters, failed to attend court hearings, and failed to preserve the identity of client funds and violated his oath of office as an attorney. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
ELMORE HUDSON, JR., APPELLANT.
761 N.W.2d 536

Filed February 20, 2009. No. S-08-151.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Constitutional Law: Right to Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
4. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance

was deficient and that this deficient performance actually prejudiced his or her defense.

5. ____: ____. The two-prong test for an ineffective assistance of counsel claim need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.
6. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
7. **Effectiveness of Counsel: Proof: Words and Phrases.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
8. **Jury Instructions.** If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

This is an appeal by Elmore Hudson, Jr., from the denial of his motion for postconviction relief. The primary issue presented on appeal is whether Hudson was deprived of effective assistance of counsel when his trial counsel failed to make a motion for mistrial based on an allegedly improper communication between the judge and jury. We conclude that counsel's failure to move for a mistrial was not prejudicial and, therefore, affirm the judgment of the district court.

FACTS

Hudson's criminal trial for first degree murder and attempted second degree murder began on September 30, 2002. Closing

arguments took place during the morning of October 8. In the afternoon, instructions were read and the jury adjourned to deliberate. The following morning, the jury submitted three written questions to the court: "1. What happens if it is a hung jury? 2. Can a spouse be required to testify against a spouse? 3. Can we read or have copies of statements (police report)?" The court responded, "1. Cannot comment. 2. Cannot comment. 3. In addition to live testimony you have been given all of the evidence upon which you have to decide the case." At 2 p.m. the same day, the jury submitted a fourth question which asked, "[D]o we all have to vote not guilty of 1st degree murder before moving to second degree? Or can some of us be undecided and move to the lesser degree?" At 2:35 p.m., the court responded, "Refer to the instructions. Remember, your final verdict on each count must be unanimous."

After the jury informed the court that it had reached a verdict, late in the afternoon of October 9, 2002, but before the verdict was announced, Hudson's trial counsel inquired about a communication that had occurred between the trial court and jury outside of his presence:

> [Hudson's counsel]: And the only other thing was, apparently, someone in passing suggested to your bailiff or inquired as to how long they had to deliberate or how long they were supposed to deliberate, and at some point the bailiff contacted the Court and went back and told them basically you deliberate as long as the case lasted; is that my understanding?
>
> THE COURT: Well, what happened is the first questions that were posed by the jury included a question about what happens if the jury is hung, which I told you my comment was, I can't comment on that. When that question was delivered by my bailiff, [the jurors] wondered how long if they were — they would have to deliberate if they couldn't reach a verdict, and I just told [the bailiff] that a rule of thumb is generally at least the length of time of the trial, but that's not necessarily the hard and fast rule. So that's what that is about.

> [Hudson's counsel]: And I don't think that question was in writing, and that's the only reason I wanted to — that's all I wanted to make a record of. That's it.
>
> THE COURT: No, it wasn't. So that did occur.

At the evidentiary hearing on his motion for postconviction relief, Hudson submitted two exhibits. First he offered the deposition of the trial court's bailiff. After reviewing the bill of exceptions, the bailiff stated she recalled being asked the question about the length of deliberations; she testified, "I — informally . . . went and asked the judge, [stating that the jurors] want to know how long they have to deliberate. And he said, well, generally it's — it can be as long as the trial lasted. And so I must have gone back and repeated that answer to the jurors." The bailiff also stated that it would have been inappropriate for her to answer the question regarding the length of deliberations because it was not a standard administrative question. The bailiff testified that she felt the question needed to be answered by the trial judge.

The deposition of Hudson's trial counsel was also submitted, and he testified regarding the alleged improper communication:

> At some point [in] the day the jury announced its verdict, [and] I was advised by the judge's bailiff . . . that one of the members of the jury upon returning from lunch had inquired as to how long the jury would be required to deliberate. She indicated to me that she told the juror that she would then go and ask the judge in response to that question.
>
> She then went and asked the judge, who indicated or who directed [the bailiff] to tell [the jurors] something along the lines of they have to deliberate generally as long as it took to try the case. I think I found this — that this — so she went and did that. She went and told the jury or that juror who asked the question that answer.
>
> I don't think I found that out until the jury had actually reached its verdict and I had come over from my office . . . .

The verdict was rendered at 4:37 p.m. on October 9, 2002. Hudson was convicted of first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. On October 21, Hudson moved for a new trial through his trial counsel. Hudson sought a new trial based, in part, on the allegedly improper and prejudicial communication between the court and the jury regarding the possible length of deliberations. The court found that the communication did not prejudice Hudson and overruled the motion for a new trial.

Hudson's trial counsel represented him on direct appeal. Among other issues raised, Hudson claimed that the district court erred in denying his motion for a new trial based upon an alleged improper communication between the trial judge and jury concerning the length of time for deliberations. We affirmed the conviction on direct appeal, rejecting Hudson's judicial misconduct claim because Hudson's trial counsel failed to move for a mistrial before the verdict was announced.[1]

Following our resolution of the direct appeal, Hudson filed a pro se motion for postconviction relief in the district court. In his motion, Hudson alleged, among other things, improper communication between the trial judge and the jury. Without stating its reasons or conducting an evidentiary hearing, the district court denied Hudson's claims for postconviction relief. On appeal, we noted that Hudson's claim was not procedurally barred because Hudson was represented by the same attorney at trial and on direct appeal.[2] We determined that the district court erred in denying Hudson's claim for postconviction relief without an evidentiary hearing. We reversed, and remanded the cause with directions to hold an evidentiary hearing on ineffective assistance of counsel.[3]

After the evidentiary hearing, the district court granted Hudson's motion for postconviction relief with respect to the

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[1] *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

[2] *State v. Hudson*, 270 Neb. 752, 708 N.W.2d 602 (2005).

[3] *Id.*

manner in which the trial court awarded credit for time served at his sentencing, and that subject is not at issue in this appeal. The district court overruled the motion, however, as to all other grounds. Hudson appeals.

ASSIGNMENTS OF ERROR

Hudson assigns that the district court erred in determining that the trial court's communication to the jury was not prejudicial to the extent that Hudson was denied a fair trial and that therefore, trial counsel was ineffective in failing to file a motion for mistrial so as to preserve the issue for appeal.

STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[4] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[5] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

ANALYSIS

Hudson asserts that the district court erred in denying his ineffective assistance of counsel claim. Hudson argues that trial counsel should have filed a motion for mistrial based on an improper and prejudicial ex parte communication between the judge and jury. We conclude that the district court did not err in denying Hudson's motion for postconviction relief alleging ineffective assistance of counsel, because the ex parte communication was not prejudicial, and therefore, a motion for mistrial would not have affected the outcome of this case.

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[4] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[5] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *Moyer, supra* note 5.

[3-6] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[8] We have explained that to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[9] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[10] The two-prong test for an ineffective assistance of counsel claim need not be addressed in order. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.[11] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[12]

[7] Following Hudson's conviction, trial counsel failed to make a motion for mistrial after being informed of an ex parte communication between the trial court and the jury. Assuming, without deciding, that trial counsel's failure to move for a mistrial was deficient, we examine the second prong of the *Strickland* test, whether such inaction prejudiced Hudson. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[13] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[14] Thus, Hudson can only show prejudice if a motion for mistrial based on the ex parte communication would have been successful.

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[8] *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[9] *Strickland, supra* note 6.

[10] *Moyer, supra* note 5; *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[11] *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000); *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999).

[12] *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[13] *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

[14] *Miner, supra* note 8.

In the case at hand, an ex parte communication took place at the direction of the trial court between the bailiff and the jury. As pertinent, Neb. Rev. Stat. § 25-1116 (Reissue 2008) provides:

> After the jur[ors] have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

[8] We have stated that if it becomes necessary to give further instructions to the jury during deliberations, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.[15] Clearly, that procedure was not followed in this case, although it should have been. But that does not mean that a motion for mistrial based on the trial court's error would have been properly granted.

We have reviewed ex parte communications on several other occasions. In *State v. Bodfield*,[16] we recognized the principle that a trial judge must not coerce a verdict or intimidate a jury. In that case, at the trial judge's direction, the clerk of the court informed the jurors, ex parte, of inclement weather and gave jurors the option of continuing deliberations or returning 2 days later. We determined that that communication was neither an instruction on the substantive issues of the case nor an attempt to coerce or accelerate deliberations to a verdict. We concluded that the communication did not rise to the level of coercion or intimidation.[17]

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[15] *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002).

[16] *State v. Bodfield*, 228 Neb. 205, 421 N.W.2d 794 (1988).

[17] *Id*.

In *State v. Thomas*,[18] we again addressed an ex parte communication between the judge and jury. In *Thomas*, on the second day of deliberations, the jury foreman sent a note to the trial judge stating that the jury was deadlocked. Outside the presence of the parties or their counsel, the trial judge told the jury to continue deliberating because it was too soon to abandon the effort to reach a verdict. On appeal, we determined that the communication between the trial court and the jury merely directed the jury to continue its deliberations. We concluded that the direction did not have a tendency to influence the verdict.[19]

And recently, in *State v. Floyd*,[20] we addressed an ex parte communication between a bailiff and jury. In *Floyd*, we determined that a bailiff's ex parte communications to a jury regarding the potential length of deliberations went beyond simple administrative matters and, thus, resulted in misconduct.[21] We concluded that the bailiff's improper communication with jurors, in which the bailiff stated that the jurors would be required to deliberate the rest of the week, prejudiced the defendant and denied him a fair trial.

Hudson likens this case to *Floyd*, arguing that the ex parte communication was prejudicial. Hudson's reliance on *Floyd*, however, is misplaced because *Floyd* is distinguishable in two significant ways. First, in *Floyd*, the bailiff alone was responsible for the improper communications with the jury. Here, the bailiff referred the juror's question regarding the length of deliberations to the judge and merely repeated the judge's response. Second, the communication in *Floyd* was coercive and prejudicial. In *Floyd*, the jury was ordered to return to deliberations after it was determined that the jury's verdicts were not unanimous. The communication was made to the

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[18] *State v. Thomas*, 262 Neb. 985, 637 N.W.2 632 (2002).

[19] *Id.*

[20] *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[21] *Id*.

juror who was known to be the lone dissenting juror. Either directly or indirectly, the communication focused on the potential effect that the juror's continued dissent would have on the length of deliberations.

In this case, however, the communication to the jury was not coercive and would not have pressured the average juror during deliberations. Although the trial court suggested a time limit for jury deliberations, there is nothing in the court's remarks suggesting that the jury could not take all of the time it needed in reaching a verdict. And nothing in the court's communication expressed its views concerning the facts, or the guilt or innocence of Hudson. It is not clear from the record that at the time of the communication, the jurors were unable to agree upon a verdict. And the jury deliberated for an additional 4 to 5 hours after the communication.

Taken as a whole, the record shows that although the communication was improper, trial counsel's failure to move for a mistrial was not prejudicial. Hudson has not demonstrated that the communication was improper to the extent necessary to have warranted the granting of a mistrial.

Hudson also relies on *State v. Mahlin*[22] for the proposition that a new trial is required if the record does not affirmatively show that an ex parte communication had no tendency to influence the verdict. While *Mahlin* correctly states the rule governing communication between a trial court and jurors, *Mahlin*, as a direct appeal, required a different burden of proof. As we explained above, to prevail on a claim of ineffective assistance of counsel in this case, Hudson must show that counsel's performance was deficient and that this deficient performance actually prejudiced his defense.[23] Hudson has failed to do so.

Despite his assertions to the contrary, Hudson has not shown that he was prejudiced in the defense of his case by trial counsel's failure to move for a mistrial. And because Hudson failed to establish he was prejudiced, we do not

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[22] *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

[23] *Moyer, supra* note 5; *Molina, supra* note 10.

need to address whether his trial counsel's performance was deficient.[24]

CONCLUSION

Although communication between the trial judge and jurors should always take place with the parties and their counsel present (unless waived), the record before us does not affirmatively show that the communication in this case warranted a mistrial. Thus, Hudson failed to meet his burden of proving that he was prejudiced by alleged ineffective assistance of counsel. The judgment of the district court is affirmed.

AFFIRMED.

[24] See State v. *Boppre*, 252 Neb. 935, 567 N.W.2d 149 (1997), *disapproved on other grounds, State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL J. SIMS, APPELLANT.
761 N.W.2d 527

Filed February 20, 2009. No. S-08-432.

1. **Postconviction.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Constitutional Law.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights.
4. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
5. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
6. **Criminal Law: Judgments: Records.** A court has inherent power in a criminal case to correct its records to reflect the "truth," nunc pro tunc.
7. **Judgments.** Neb. Rev. Stat. § 25-2001(3) (Reissue 2008) states that clerical mistakes in judgments, orders, or other parts of the record and errors therein arising

from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party.

8. ____. The general rule that a judgment is no longer open to amendment, revision, modification, or correction after the term at which it was rendered does not apply where the purpose is to correct or amend clerical or formal errors so as to make the record entry speak the truth and show the judgment which was actually rendered by the court.
9. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
10. **Sentences.** When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect, and the original sentence remains in force.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael J. Sims, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

This case involves appeals by Michael J. Sims from two different rulings which we have combined in one opinion. The first ruling pertains to Sims' second motion for postconviction relief. The second ruling pertains to a sentence-related motion for an order nunc pro tunc which Sims filed in his original criminal case.

With respect to the second postconviction motion, the district court for Douglas County denied Sims' motion to alter or amend the district court's judgment which had denied his second motion for postconviction relief. After a jury trial, Sims was found guilty of the charges in a four-count information: count I, murder in the first degree; count II, use of a deadly weapon to commit a felony; count III, attempted murder in the first degree; and count IV, use of a deadly weapon

to commit a felony. This court affirmed the convictions in *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999) (*Sims I*). This court also affirmed the denial of Sims' first postconviction motion in *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006) (*Sims II*). In his second postconviction motion, Sims claims that he received ineffective assistance of counsel at trial and on appeal and that there was insufficient evidence to convict him.

In a separate motion filed in district court in the original criminal case, Sims asked the district court for an order nunc pro tunc to correct a discrepancy between the sentence that was orally pronounced on count III, attempted murder, and the written sentence on count III in a journal entry titled "Judgment and Sentence."

The district court denied both motions. Sims appeals each of these rulings. We affirm the denial of relief related to Sims' second postconviction motion, reverse the order denying his motion for an order nunc pro tunc, and remand the cause with directions.

STATEMENT OF FACTS

After a jury trial, Sims was found guilty of murder in the first degree, attempted murder in the first degree, and two counts of use of a deadly weapon to commit a felony. On November 24, 1998, the district court for Douglas County pronounced Sims' sentences as life in prison for count I, murder; 10 to 12 years in prison for count II, use of a deadly weapon to commit a felony; 10 to 25 years in prison for count III, attempted murder; and 10 to 12 years in prison for count IV, use of a deadly weapon to commit a felony. However, the written journal entry titled "Judgment and Sentence" states that with respect to count III, attempted murder, Sims was sentenced to 20 to 25 years in prison, rather than 10 to 25 years as had been orally pronounced.

Sims appealed his convictions and sentences to this court. On direct appeal in *Sims I*, Sims argued that the evidence was insufficient to sustain his convictions, that the trial court erred in not granting his motion for a new trial, and that it was plain error for the trial court not to instruct the jury on self-defense

or on uncorroborated accomplice testimony. Sims also argued that he received ineffective assistance of trial counsel based on his trial counsel's failure to (1) move for discharge due to alleged violations of his right to speedy trial under state statutes and the state and federal Constitutions, (2) request a jury instruction regarding uncorroborated accomplice testimony, and (3) request a jury instruction on the issue of self-defense. On direct appeal, Sims' counsel was different from his trial counsel.

In *Sims I*, this court determined that the record afforded an insufficient basis upon which to resolve Sims' claims of ineffective assistance of trial counsel and declined to review the issue on direct appeal. On the remaining claims, the court affirmed Sims' sentences and convictions.

After this court's disposition in *Sims I*, Sims filed a verified motion for postconviction relief alleging claims of ineffective assistance of counsel. After holding an evidentiary hearing on Sims' claims, the district court denied Sims' motion, concluding that Sims failed to show that his counsel's performance was constitutionally deficient.

In *Sims II*, Sims appealed the district court's denial of his first motion for postconviction relief to this court, and on postconviction appeal, Sims claimed that his trial counsel was ineffective for (1) failure to file a motion for discharge on statutory and constitutional speedy trial grounds and (2) failure to assert an objection under *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). He also claimed as error the failure of the postconviction trial judge to recuse himself. In *Sims II*, Sims did not argue a claim of ineffective assistance of appellate counsel on direct appeal. In *Sims II*, this court upheld the district court's denial of Sims' first motion for postconviction relief.

On April 2, 2007, Sims filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Nebraska. *Sims v. Houston*, 562 F. Supp. 2d 1066 (D. Neb. 2008). In his petition, Sims argued that he received ineffective assistance of trial and appellate counsel. *Id*. On May 21, 2008, the federal district court entered an order denying Sims' petition, finding that with the exception of his ineffective assistance of counsel

claims based on his right to speedy trial, all of his claims were procedurally defaulted because he did not exhaust his remedies in state court prior to bringing the claims in his federal habeas action. *Id*. Furthermore, with respect to the speedy trial claim, the federal district court concluded that Sims' trial counsel was not ineffective for seeking additional time to prepare. *Id*.

On June 29, 2007, Sims filed a second motion for postconviction relief in the district court for Douglas County. That motion alleges that Sims' trial counsel was ineffective on the following grounds, which we quote:

> [C]ounsel: (1) failed to object, motion to strike, motion for mistrial, request curative instruction and preserve for appellate review that trial court committed plain error by reading instructions to jury prior to final argument; (2) failed to object, motion to strike, motion for mistrial, request curative instruction and preserve for appellate review prosecutor's variance to alternative theory that [Sims] assisted perpetrator of crime of Murder in the First Degree; (3) failed to object, motion to strike, request curative instruction and preserve for appellate review failure to give adequate notice of alternative theory that [Sims] only assisted perpetrator of crime of Murder in the First Degree; (4) failed to object, request proper instruction, and preserve for appellate review request that Instruction 5 instruct only as to what [Sims] was given adequate notice to defend against; (5) failed to object, request correct instruction, and preserve for appellate review request that Jury Instruction 5 properly instruct on alternative theory of aiding and abetting; (6) failed to object, request correct instruction, and preserve for appellate review request that Jury Instructions 5, 6, 7, and 8 include material elements of aiding and abetting; (7) failed to object, request correct instruction, and preserve for appellate review request that Jury Instruction 14 include Intent is required to be an aider and abettor; (8) failed to object, request correct instruction, and preserve for appellate review request that Jury Instruction 14 include that Intent must be found beyond a reasonable doubt; (9) failed to object and preserve for

> appellate review request Jury Instruction and definition on Self-Defense; (10) failed to object and preserve for appellate review request Jury Instruction on Uncorroborated Accomplice testimony; (11) failed to object and preserve for appellate review request Verdict Form to allow Jury to distinguish theory on which [it] found guilt.

Sims also argued that his appellate counsel, who was different from his trial counsel, was ineffective on direct appeal for failing to raise these same and similar issues and that there was insufficient evidence presented at trial to convict him.

On March 21, 2007, in a separate filing filed in Sims' original criminal case, Sims filed a motion for an order nunc pro tunc asking the district court to correct the discrepancy between the sentence of 10 to 25 years in prison for count III, attempted murder, that was orally pronounced at sentencing and the written journal entry that stated Sims was sentenced to 20 to 25 years in prison on count III.

With respect to Sims' second motion for postconviction relief, after conducting an evidentiary hearing, the district court overruled the motion on November 8, 2007, finding that all the issues raised by Sims were known to him at the time he filed his first motion for postconviction relief and that he was therefore procedurally barred from raising these claims in a second motion for postconviction relief. On November 15, Sims filed a motion to alter or amend the district court's judgment, and the district court denied the motion on April 9, 2008.

With respect to Sims' motion for an order nunc pro tunc, after holding a hearing, the district court denied the motion on April 9, 2008, stating only that "[t]he Court having reviewed the pleadings and arguments finds that [Sims'] Motion for an Order Nunc Pro Tunc is hereby denied."

Sims appeals from these two separate orders.

ASSIGNMENTS OF ERROR

Sims assigns as error, rephrased and summarized, that (1) the district court erred by denying his motion to alter or amend the judgment which had denied his second motion for postconviction relief and (2) the district court erred by denying his motion for an order nunc pro tunc.

STANDARDS OF REVIEW

[1,2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

ANALYSIS

Sims' Successive Motion for Postconviction Relief Is Procedurally Barred.

The first aspect of the appeal before us pertains to the denial of Sims' motion to alter or amend the judgment denying postconviction relief. We have previously determined that a motion to alter or amend a postconviction judgment is an appropriate motion, that the filing of the motion terminates the time for filing a notice of appeal under Neb. Rev. Stat. § 25-1912(3) (Reissue 2008), and that a new period of 30 days for filing a notice of appeal commences when the motion is ordered dismissed. *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[3-5] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008), is available to a defendant to show that his or her conviction was obtained in violation of his or her constitutional rights. *State v. Marshall, supra*. However, the need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id*. Therefore, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *Id*.

In the instant case, the allegations in Sims' second motion for postconviction relief involve ineffective assistance of counsel claims against his trial and appellate counsel as well as Sims' claim that there was insufficient evidence to convict him. Sims previously raised, and this court rejected on direct appeal, Sims' claim that there was insufficient evidence to convict him. Further, Sims' claims of ineffective assistance of counsel were

known or knowable to Sims at the time of his direct appeal and his first motion for postconviction relief. Sims attempts to excuse his failure to raise his ineffective assistance of counsel claims in his prior postconviction motion by arguing that his postconviction counsel was ineffective for failing to raise these claims. However, we have held that there is no constitutional guarantee to effective assistance of counsel in a postconviction action, and therefore, Sims' claim of ineffective assistance of postconviction counsel is unavailing. *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

Sims further attempts to excuse his failure to raise the ineffective assistance of counsel claims in his first postconviction motion by arguing that he could not raise the claims in his first motion because he is not trained in the law. We have addressed a similar claim in *State v. Parmar*, 263 Neb. 213, 221-22, 639 N.W.2d 105, 112 (2002), stating:

> Although [the movant] argues that he appeared pro se in the [first] postconviction proceeding, this is of no avail because . . . there is no absolute requirement of appointment of counsel in postconviction cases, and the defendant has the right of self-representation. A pro se party is held to the same standards as one who is represented by counsel.

Therefore, Sims' attempts to excuse his failure to raise his ineffective assistance of counsel claims in his previous motion are without merit. These claims were known or knowable to Sims in the previous proceedings, and he had an opportunity to raise them and failed to do so. Because Sims has not affirmatively shown on the face of his motion that the grounds for relief raised in his second motion for postconviction relief could not have been asserted at the time he filed his prior motion, his claims were properly rejected by the district court and the denial of his motion to alter or amend the judgment on this basis is affirmed.

The District Court Erred by Denying Sims' Motion for an Order Nunc Pro Tunc.

The second aspect of the appeal before us pertains to the district court's denial of Sims' motion for an order nunc pro tunc.

In that motion, Sims asked the district court to correct a discrepancy between the sentence orally pronounced at sentencing and the sentence written in the journal entry. At sentencing, the district court orally sentenced Sims on count III, attempted murder, to 10 to 25 years in prison, whereas the written journal entry states that Sims was sentenced to 20 to 25 years in prison for count III. The State acknowledges that there is a discrepancy between the orally pronounced sentence and the written journal entry. We agree with Sims that his motion for an order nunc pro tunc should have been granted, and we reverse, and remand with directions.

In addressing Sims' motion for an order nunc pro tunc, the district court denied the motion without discussing its reasoning. We note, however, that a review of the bill of exceptions from the hearing on the motion for an order nunc pro tunc reveals that the district court's main issue with the motion was the court's concern that the motion may not have been timely, because Sims filed the motion in his criminal case after the completion of his direct appeal. After expressing this concern, the district court went on to state, "[A]s a practical matter, I don't see that it makes a difference, and I wouldn't object to making the change if after I reviewed the documents I believe that your argument was correct."

[6,7] The parties agree, and the record shows, that a sentencing error occurred. A court has inherent power in a criminal case to correct its records to reflect the "truth," nunc pro tunc. *State v. Kortum*, 176 Neb. 108, 110, 125 N.W.2d 196, 199 (1963). Neb. Rev. Stat. § 25-2001(3) (Reissue 2008) states that "[c]lerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party . . . ." We have previously explained:

> [T]he office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render

> an order different from the one actually rendered, even though such order was not the order intended.

Continental Oil Co. v. Harris, 214 Neb. 422, 424, 333 N.W.2d 921, 923 (1983).

[8] We have applied the nunc pro tunc procedure in sentencing cases. See, *State v. Kortum, supra*; *State v. Ziemann*, 14 Neb. App. 117, 130, 705 N.W.2d 59, 70 (2005) (citing *Kortum* for the proposition that "[i]t is clear that a criminal sentence can be corrected by an order nunc pro tunc"). This court has also held that the general rule that a judgment is no longer open to amendment, revision, modification, or correction after the term at which it was rendered does not apply where the purpose is to correct or amend clerical or formal errors so as to make the record entry speak the truth and show the judgment which was actually rendered by the court. *Middle Loup P. P. & I. D. v. Loup River P. P. D.*, 149 Neb. 810, 32 N.W.2d 874 (1948) (Yeager, J., dissenting; Paine, J., joins). The district court's concern regarding the timeliness of Sims' motion was not warranted.

[9,10] When determining if the sentencing error in this case should be corrected by an order nunc pro tunc, it is necessary to determine which sentence is legally enforceable. We have held that when the sentence orally pronounced at sentencing differs from a later written sentence, the former prevails. See *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). In *Schnabel*, we explained that a sentence validly imposed takes effect from the time it is pronounced. When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *Id*. Any attempt to do so is of no effect, and the original sentence remains in force. *Id*. Therefore, in this case, the sentence on count III, orally pronounced as 10 to 25 years in prison, was within the statutory range and was valid at the time it was pronounced, and the written journal entry stating that Sims was sentenced to 20 to 25 years in prison on count III was erroneous and of no legal effect.

Looking at the record before this court, it appears that the erroneous written sentence was the result of a clerical mistake

that occurred when the journal entry was created. The correction of the journal entry would not revise or alter a judgment entered; rather, it would correct the record to accurately state the judgment entered.

The State does not clearly object to this court's acting to correct the sentence. However, the State argues that because Sims was sentenced to life in prison for his conviction on count I, the first degree murder charge, any error in the duration of his sentence for the conviction on count III, attempted murder, is of no consequence. In this regard, we note that we are aware that Sims has received a life sentence on count I. However, it is possible that the Nebraska Board of Pardons could commute the life sentence on count I to a term of years, in which case the sentence on count III could become relevant. See *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006) (discussing statutory authority for commuting sentences). We are not persuaded by the State's argument.

It is important to note that the "purpose of [an order nunc pro tunc] is to correct the record which has been made, so that it will truly record the action really had, but which through some inadvertence or mistake has not been truly recorded." *Calloway v. Doty*, 108 Neb. 319, 322, 188 N.W. 104, 105 (1922). Therefore, even if correcting the erroneous journal entry proves to have no practical effect, it ensures the integrity of the system and the accuracy of the record of the court.

Given the discrepancy between the orally pronounced sentence on count III and the written entry relating thereto, we conclude that the orally pronounced sentence is controlling and that Sims' motion for an order nunc pro tunc correcting the erroneous written entry should have been granted. The district court's denial should be and is hereby reversed, and the cause is remanded with directions to correct the written entry.

CONCLUSION

The district court did not err when it determined that Sims' second motion for postconviction relief was procedurally barred. We therefore affirm the district court's denial of Sims' motion to alter or amend the judgment on this basis. The

district court did err by denying Sims' separate motion for an order nunc pro tunc filed in his original criminal case, because the sentencing term for the conviction on count III, attempted murder, set forth in the written journal entry titled "Judgment and Sentence," was inconsistent with the sentence orally pronounced by the district court. The ruling denying Sims' motion for an order nunc pro tunc is reversed. The cause is remanded to the district court with directions to the district court to enter an order nunc pro tunc directing the clerk of the court to correct the journal entry to state a sentence on count III of 10 to 25 years in prison that is consistent with the sentence orally pronounced on November 24, 1998.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

VICKI KING, SPECIAL ADMINISTRATRIX OF THE ESTATE OF BRADLEY B. KING, DECEASED, APPELLANT, V. BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY, A DELAWARE CORPORATION, APPELLEE.

762 N.W.2d 24

Filed February 27, 2009. No. S-05-1520.

1. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.
2. ____: ____: ____. An appellate court reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.
3. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
5. **Torts: Negligence: Words and Phrases.** In a toxic tort case, general causation addresses whether a substance is capable of causing a particular injury or condition in a population, while specific causation addresses whether a substance caused a particular individual's injury.

6. **Courts: Evidence.** A court should first consider whether a party has presented admissible general causation evidence before considering the issue of admissible specific causation evidence.
7. **Expert Witnesses: Evidence.** Although epidemiological studies cannot prove causation, they can provide a foundation for an epidemiologist to infer and opine that a certain agent can cause a disease.
8. **Evidence.** When epidemiological evidence is used in legal disputes, the methodological soundness of a study and its use in resolving causation require an assessment of whether (1) the study reveals an association between an agent and disease, (2) any errors in the study contributed to an inaccurate result, and (3) the relationship between the agent and the disease is causal.
9. **Federal Acts: Railroads: Negligence: Expert Witnesses: Proof.** To recover for exposure to a toxic substance in an action under the Federal Employers' Liability Act, an employee must present expert testimony evidence supporting an inference that the employee's injuries were caused by exposure to the substance attributable to the railroad's negligent act or omission.
10. **Courts: Expert Witnesses.** Before admitting expert opinion testimony under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert. If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid.
11. ____: ____. Normally, after a court finds that an expert's methodology is valid, it must also determine whether the expert reliably applied the methodology.
12. **Expert Witnesses.** Under the framework set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the proponent of expert testimony must establish by a preponderance of the evidence that (1) the reasoning or methodology underlying an expert's testimony is scientifically valid and (2) the reasoning or methodology can be properly applied to the facts.
13. **Courts: Expert Witnesses.** In determining the admissibility of an expert's opinion, the court must focus on the validity of the underlying principles and methodology—not the conclusions that they generate. Reasonable differences in scientific evaluation should not exclude an expert witness' opinion.
14. ____: ____. A trial court has discretion to exclude expert testimony if there is too great an analytical gap between the data and the opinion proffered. An expert's opinion must be based on good grounds, not mere subjective belief or unsupported speculation.
15. ____: ____. A trial court should admit expert testimony if there are good grounds for the expert's conclusion notwithstanding the judge's belief that there are better grounds for some alternative conclusion.
16. **Expert Witnesses.** The relevant factors for assessing the reliability or scientific validity of expert opinion are whether (1) the theory or technique can be, or has been, tested; (2) the theory or technique has been subjected to peer review and publication; (3) there is a known or potential rate of error; (4) there are standards

controlling the technique's operation; and (5) the theory or technique enjoys general acceptance within the relevant scientific community.

17. ____. Under the framework set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), a trial court should not require general acceptance of the causal link between an agent and a disease or condition if the expert's opinion is otherwise based on a reliable methodology.
18. ____. Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their opinions by following an accepted scientific method or procedure as it is practiced by others in their field.
19. **Expert Witnesses: Juries.** Once an expert has established that he or she reliably assessed the data, the weight of the expert's conclusion is an issue for the jury to resolve.
20. **Expert Witnesses.** If an expert's underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.
21. **Evidence.** The significance of epidemiological studies with weak positive associations is a question of weight, not admissibility.
22. **Expert Witnesses.** Experts are not precluded from showing that despite an epidemiological study's failure to show a statistically significant relationship, others in their field would nonetheless rely on the study to support a causation opinion and that the probability of chance causing the study's results is low.
23. **Courts: Expert Witnesses.** Trial courts are not required to delve into every possible error in an expert's underlying data unless it is raised by the party opposing the admission of the expert's opinion.
24. **Courts: Evidence.** A court should normally not question a published epidemiological study's results over the mere possibility of error unless the study's findings plausibly appear attributable to unrecognized error.
25. ____: ____. Courts should normally require more than one epidemiological study showing a positive association to establish general causation, because a study's results must be capable of replication.
26. **Expert Witnesses.** If an epidemiological expert has performed or relied on an unpublished meta-analysis of observational studies, or if the expert's causation opinion has not been subjected to peer review, the expert should show that he or she has used a methodology or set of criteria that is generally accepted in the field.
27. ____. Individual epidemiological studies need not draw definitive conclusions on causation before experts can conclude that an agent can cause a disease.
28. **Courts: Expert Witnesses.** If an expert's general causation opinion is admissible to show that a suspected agent should be ruled in as a possible cause of the plaintiff's disease, the court must next determine whether the expert performed a reliable differential etiology.
29. **Expert Witnesses: Physicians and Surgeons.** To perform a reliable differential etiology, a medical expert must first compile a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration.

30. **Expert Witnesses: Physician and Patient.** At the ruling-in stage of a differential etiological analysis, an expert's opinion is not reliable if the expert considers a suspected agent that cannot cause the patient's disease or completely fails to consider a cause that could explain the patient's symptoms.
31. **Expert Witnesses.** At the ruling-out stage of a differential etiological analysis, an expert must have good grounds for eliminating potential hypotheses; unsupported speculation will not suffice, but what constitutes good grounds will vary depending upon the circumstances of each case.
32. **Expert Witnesses: Physicians and Surgeons.** In performing a differential etiology, a decision to eliminate an alternative hypothesis based on information gathered by using the traditional tools of clinical medicine will usually have the hallmarks of reliability required under the framework set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). These tools include physical examinations, medical and personal histories, and medical testing.
33. **Expert Witnesses.** The traditional tools for ruling out potential hypotheses in a differential etiology are guideposts; an expert's decision to rule out an alternative hypothesis will often depend on other factors for which clear rules are not available.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, W. MARK ASHFORD, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Richard J. Dinsmore and Jayson D. Nelson, of Law Offices of Richard J. Dinsmore, P.C., for appellant.

Nichole S. Bogen and James A. Snowden, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

Bradley B. King brought this toxic tort action under the Federal Employers' Liability Act (FELA) against the appellee, Burlington Northern Santa Fe Railway Company (BNSF). He alleged that he contracted multiple myeloma during his employment with BNSF because of exposure to diesel exhaust emissions. Multiple myeloma is a cancer originating in the

bone marrow plasma cells.[1] After Bradley died in 2002, his wife, Vicki King, revived the action in her name.

BNSF moved to exclude the testimony of King's expert witness. Each party presented dueling experts. Differing epidemiological studies supported the experts' deposition testimony. King's expert, Dr. Arthur Frank, blamed Bradley's multiple myeloma on his exposure to diesel exhaust. Of course, BNSF's expert, Dr. Peter G. Shields, disagreed. He believed that the causes were unknown and that the majority of epidemiological studies failed to show that diesel exhaust can cause multiple myeloma. The district court sustained BNSF's motion to exclude Frank's testimony, concluding that it failed to pass muster under our *Daubert*/*Schafersman*[2] framework. It reasoned that his methodology was unreliable because the studies he relied on failed to conclusively state that exposure to diesel fuel exhaust causes multiple myeloma. The court later sustained BNSF's motion for summary judgment. The Nebraska Court of Appeals affirmed.[3] We granted King's petition for further review.

The issues at the trial level were whether the studies Frank relied on were sufficient to support his causation opinion and whether he based his opinion on a reliable methodology. We do not reach these issues because we conclude that the district court applied the wrong standard in determining them. We reverse the decision of the Court of Appeals with directions to remand the cause to the district court for further proceedings consistent with this opinion.

II. BACKGROUND

In 1972, at age 20, Bradley started working for BNSF, and, over 28 years, he worked as a brakeman, switchman, conductor,

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[1] See, 4 J.E. Schmidt, M.D., Attorney's Dictionary of Medicine and Word Finder M-280 (1998); Richard Sloane, The Sloane-Dorland Annotated Medical-Legal Dictionary 470 (1987 & Supp. 1992).

[2] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[3] *King v. Burlington Northern Santa Fe Ry. Co.*, 16 Neb. App. 544, 746 N.W.2d 383 (2008).

and engineer. He testified that his work exposed him to diesel exhaust, especially his work as a brakeman. Bradley stated that his exposure caused him to experience headaches and nausea and, at times, to feel thick tongued. The record also shows that Bradley smoked about a pack of cigarettes per day for 33 years until he quit because of his illness.

1. KING'S EXPERTS

Dr. Michael Ellenbecker is a certified industrial hygienist and professor of industrial hygiene at the University of Massachusetts Lowell. He testified regarding a proposed industrial hygiene standard for workers' diesel exhaust exposure. The proposed standard called for a worker's maximum allowable exposure to diesel exhaust not to exceed the general population's exposure to diesel exhaust. He stated that the organization had proposed this limit because diesel exhaust is a suspected human carcinogen. He further stated that industrial hygiene standards called for industries to minimize carcinogen exposure to below the permissible exposure limit because any exposure increases the risk of developing cancer.

Ellenbecker had examined a study showing that railroad workers in job categories like Bradley's had exposure to diesel exhaust significantly above the general population's exposure. He had reviewed BNSF's industrial hygiene samples from 1983, 2000, and 2002, and concluded that Bradley had a significant exposure to diesel exhaust. He believed the greatest exposure occurred in Bradley's early years of employment.

Frank is board certified in internal medicine and occupational medicine. At Drexel University, he is chair of the department of environmental and occupational health. Frank stated that benzene is in diesel exhaust and that the scientific evidence supports his opinion that benzene alone and diesel exhaust can cause multiple myeloma. He conceded that contrary statements existed in the scientific literature and that he did not know of any studies explicitly stating that either benzene or diesel exhaust causes multiple myeloma. He explained that scientific studies usually do not state that a definite causal relationship exists or even that the relationship appears to be causal; instead, the studies usually "point to" a

causal relationship. He believed that the risk of disease would increase with increased exposure. But he rejected the idea that a minimum exposure level had to be reached before there was a risk.

Frank conceded that he had not conducted his own research, nor had he published his opinion that diesel exhaust can cause multiple myeloma. He stated that benzene was the only diesel exhaust component that has been separately studied as an agent of disease. Frank did not believe that any other diesel exhaust component was a known cause of multiple myeloma. He admitted that he had not found or performed a meta-analysis—a method of pooling the results of smaller studies—showing a relationship between multiple myeloma and diesel exhaust. Nor had he found studies comprehensively analyzing animal experiments, toxicology studies, and epidemiological studies.

Regarding the specific cause of Bradley's cancer, Frank believed that Bradley's extraordinary exposure level to diesel exhaust made it more likely than not that his exposure was a contributing cause of his disease. Moreover, after reviewing Bradley's medical history and deposition, Frank stated that in his experience as an occupational physician for 30 years, he had never seen a history of that much exposure.

Frank stated that there were few known causes of multiple myeloma. He ruled out radiation exposure as a potential cause because he failed to find evidence of unusual radiation exposure. Similarly, he ruled out diabetes as a possible causative agent because Bradley did not have this disease. Regarding Bradley's possible exposure to pesticides, Frank knew conflicting studies existed on the association between multiple myeloma and pesticide exposure. He did not believe, however, that these associations showed causation to a medical certainty. Likewise, he knew studies existed showing an association with smoking, but he did not believe the evidence supported a causal link to multiple myeloma.

2. BNSF's Experts

Shields is board certified in oncology and internal medicine. At Georgetown University, he is a professor of oncology and

associate director of cancer control and population studies. Shields had also reviewed the studies Frank relied on and disagreed with Frank's opinion. He concluded that regardless of the exposure level, researchers had not established a causal relationship between diesel exhaust or benzene and multiple myeloma. He believed that besides radiation exposure, experts did not know the causes of multiple myeloma. In sum, Shields does not believe that a few studies showing a positive association could support a causation opinion when the majority of studies had failed to show a positive association. Frank disagreed. He believed that scientific knowledge was improving and that scientific evidence from different disciplines did support a causal relationship.

3. District Court Excludes Frank's Testimony

The district court concluded that Frank was imminently qualified to give expert medical testimony. But in sustaining BNSF's motion to exclude Frank's testimony, it concluded that his opinion was unreliable because it did not have general acceptance in the field. The court also concluded that Frank's opinion regarding multiple myeloma was unreliable because of his methodology. The court stated that Frank relied on one study that showed a significant association between diesel exhaust and multiple myeloma. But it concluded that Frank could "point to no single study that conclusively states that exposure to diesel exhaust/benzene causes multiple myeloma."

In discussing Frank's differential etiology, the district court determined that it was also unreliable for three reasons: (1) The record did not show what causes "other th[a]n diesel exhaust exposure" Frank considered in his differential etiology; (2) "Frank 'ruled in' diesel exhaust exposure as a possible cause, even though no medical or scientific study concluded that such exposure causes multiple myeloma"; and (3) Frank failed to explain why he "'ruled out'" any other potential causes. The court stated that Frank's opinion "merely concludes that diesel exhaust exposure is [the] most probable [agent], even though no medical or scientific study authorizes such a conclusion."

The court sustained BNSF's motion for summary judgment. The court concluded that BNSF had satisfied its burden of demonstrating that no causal connection existed between Bradley's employment, including his exposure to diesel exhaust, and his development of multiple myeloma.

4. Court of Appeals' Decision

The Court of Appeals affirmed.[4] It recognized that it had previously accepted Frank's expert opinion testimony in another case.[5] It concluded, however, that the earlier case was distinguishable. The court did not explain why Frank's testimony was different here. Instead, it relied on the district court's conclusion that Frank had not performed a reliable differential etiology and found no abuse of discretion.[6]

III. ASSIGNMENTS OF ERROR

Although King assigns several errors, in our order granting King's petition for further review, we limited our review to two issues: (1) whether the district court and Court of Appeals erred in requiring Frank to present studies conclusively stating that diesel exhaust causes multiple myeloma and (2) whether the lower courts erred in concluding that Frank did not perform a reliable differential etiology.

IV. STANDARD OF REVIEW

[1,2] We review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.[7] We review for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.[8]

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[4] See *id.*

[5] See *Boren v. Burlington Northern & Santa Fe Ry. Co.*, 10 Neb. App. 766, 637 N.W.2d 910 (2002).

[6] See *King, supra* note 3.

[7] See, e.g., *Borawick v. Shay*, 68 F.3d 597 (2d Cir. 1995); *Winters v. Fru-Con Inc.*, 498 F.3d 734 (7th Cir. 2007); *U.S. v. Abdush-Shakur*, 465 F.3d 458 (10th Cir. 2006).

[8] See *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004). See, also, *Winters, supra* note 7; *Abdush-Shakur, supra* note 7.

[3,4] As we know, a court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[9] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[10]

V. ANALYSIS

This appeal presents our first opportunity to address the legal standards governing the reliability of expert opinion testimony based on epidemiological studies. Unfortunately, these types of cases require trial judges and this court to grapple with scientific and medical issues beyond our normal professional experiences. So we believe it would help to set out a brief, but by no means exhaustive, discussion of the scientific terms and concepts gleaned from scientific literature. Also, we will explain how researchers determine that an association exists between a suspected agent and a disease and how experts interpret those studies to determine whether the relationship is causal.

1. General Versus Specific Causation

[5,6] In *Carlson v. Okerstrom*,[11] we alluded to the distinction between general causation and specific causation. Other courts have similarly distinguished between general and specific causation. In a toxic tort case, general causation addresses whether a substance is capable of causing a particular injury or condition in a population, while specific causation addresses whether a substance caused a particular individual's injury.[12] To prevail,

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[9] See *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008).

[10] *Id.*

[11] *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

[12] See, *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347 (5th Cir. 2007); *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924 (8th Cir. 2001); *In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124 (9th Cir. 2002); *Goebel v. Denver and Rio Grande Western R. Co.*, 346 F.3d 987 (10th Cir. 2003).

a plaintiff must show both general and specific causation. But a court should first consider whether a party has presented admissible general causation evidence before considering the issue of admissible specific causation evidence.[13]

The Federal Judicial Center's Reference Manual on Scientific Evidence (Reference Manual)[14] explains that epidemiology focuses on general causation rather than specific causation.[15] Plaintiffs do not always need epidemiological studies to prove causation.[16] Yet, frequently, plaintiffs find epidemiological studies indispensable in toxic tort cases when direct proof of causation is lacking.[17]

2. Epidemiological Evidence

(a) General Concepts

Epidemiological evidence identifies agents that are associated with an increased disease risk in groups of individuals, it quantifies the excess disease that is associated with an agent, and it provides a profile of an individual who is likely to contract a disease after being exposed to the agent.[18] In short, "[e]pidemiological studies examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition."[19] And a study may show a positive or negative association or no association.

Epidemiologists use three types of studies to determine whether an association exists between a suspected agent and

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[13] See *Knight*, *supra* note 12.

[14] Reference Manual on Scientific Evidence (Federal Judicial Center 2d ed. 2000).

[15] See Michael D. Green et al., *Reference Guide on Epidemiology*, in Reference Manual, *supra* note 14 at 335-36.

[16] See, e.g., *Benedi v. McNeil—P.P.C., Inc.*, 66 F.3d 1378 (4th Cir. 1995); *Wells v. Ortho Pharmaceutical Corp.*, 788 F.2d 741 (11th Cir. 1986).

[17] See, e.g., *In re Joint Eastern & Southern Dist. Asbestos Lit.*, 52 F.3d 1124 (2d Cir. 1995).

[18] Reference Manual, *supra* note 15 at 335-36.

[19] *Merrell Dow Pharmaceuticals v. Havner*, 953 S.W.2d 706, 715 (Tex. 1997).

a disease: (1) experimental trials, (2) cohort studies, and (3) case-control studies. The latter two types are observational studies. Here, the experts relied on observational studies.

In observational studies, researchers "'observe' a group of individuals who have been exposed to an agent of interest, such as cigarette smoking or an industrial chemical."[20] They then compare the exposed group's rate of disease or death incidences to the rate in another group of individuals who have not been exposed.[21] In cohort studies, researchers first identify an exposed group and an unexposed group. They then compare the rates of disease in each group.[22] In contrast, in case-control studies, researchers first identify a group of individuals with the disease and select a comparison group of individuals without the disease. They then compare the past exposures of both groups to see if an association exists between the past exposures and incidences of disease.[23]

In sum, epidemiological studies assess the existence and strength of associations between a suspected agent and a disease or condition. But an association is not equivalent to causation.[24] "[E]pidemiology cannot objectively prove causation."[25] Instead, epidemiological studies show the "degree of statistical relationship between two or more events or variables. Events are said to be associated when they occur more or less frequently together than one would expect by chance."[26] In contrast, "[e]pidemiologists use causation to mean that an increase in the incidence of disease among the exposed subjects would not have occurred had they not been exposed to the agent."[27]

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[20] Reference Manual, *supra* note 15 at 339.

[21] *Id.*

[22] *Id.* at 340.

[23] *Id.* at 342.

[24] *Id.* at 336.

[25] *Id.* at 374.

[26] *Id.* at 387.

[27] *Id.* at 374.

[7] Although epidemiological studies cannot prove causation, they can provide a foundation for an epidemiologist to infer and opine that a certain agent can cause a disease. Epidemiologists and other experts who are qualified to interpret the data and results of these studies assess causality by looking at a study's strengths and weaknesses. They then judge how the study's findings fit with other scientific knowledge on the subject.[28]

[8] We discussed epidemiology and causation in *Schafersman v. Agland Coop*.[29] We stated that when a party uses epidemiological evidence in legal disputes, the study's methodological soundness and its use in resolving causation require answering three questions. First, does the study reveal an association between an agent and disease? Second, did any errors in the study contribute to an inaccurate result? Third, is the relationship between the agent and the disease causal?[30]

(b) Measuring the Strength of an Association in Epidemiological Studies

When an epidemiological study shows an association, experts often report its strength as the "relative risk."[31] "The relative risk is one of the cornerstones for causal inferences."[32] It refers to the increased probability for an individual in an exposed population to develop a disease.[33] Experts describe relative risk as a ratio of the incidence rate of disease in the exposed group to the incidence rate in the unexposed group: i.e., the incidence rate in the exposed group divided by the incidence rate in the unexposed group.[34]

> For example, if a study found that 10 out of 1000 women with breast implants were diagnosed with breast cancer

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[28] See *id.* at 336-37, 374.

[29] *Schafersman, supra* note 2.

[30] *Id.*

[31] See Reference Manual, *supra* note 15 at 348, 350-51.

[32] *Id.* at 376.

[33] See *id.* at 348.

[34] See *id.*

> and 5 out of 1000 women without implants (the "control" group) were diagnosed with breast cancer, the relative risk of implants is 2.0, or twice as great as the risk of breast cancer without implants. This is so, because the proportion of women in the implant group with breast cancer is 0.1 (10/1000) and the proportion of women in the non-implant group with breast cancer is 0.05 (5/1000). And 0.1 divided by 0.05 is 2.0.[35]

If both groups have the same incidence rate, the relative risk is 1.0, meaning that no association exists between the agent and the disease. If the study shows a relative risk less than 1.0, the association is negative. This means that the risk to the exposed population is less than the risk to the unexposed population.[36] If the study shows a relative risk greater than 1.0, a positive association exists, which could be causal, because the risk to the exposed population is greater than the risk to the unexposed group.[37] So to support a causal inference, the relative risk must be greater than 1.0. And "[t]he higher the relative risk, the greater the likelihood that the relationship is causal."[38] Some studies, however, use different measurements to express a relationship between an agent and disease.[39] For example, in a case-control study, an "odds ratio" measurement provides essentially the same information as relative risk.[40]

A trial judge might also have to consider whether an expert properly relied on a "meta-analysis." Researchers and experts sometimes use meta-analyses to pool the results of smaller studies that fail to support definitive conclusions.[41] A

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[35] *In re Silicone Gel Breast Impl. Prod. Liab. Lit.*, 318 F. Supp. 2d 879, 892 (C.D. Cal. 2004).

[36] Reference Manual, *supra* note 15 at 349.

[37] *Id.* See, also, *In re Bextra and Celebrex Marketing Sales Practice*, 524 F. Supp. 2d 1166 (N.D. Cal. 2007).

[38] Reference Manual, *supra* note 15 at 376.

[39] See *id.* at 350-54.

[40] See, 2 Michael Dore, Law of Toxic Torts § 28:23 (2008); Reference Manual, *supra* note 15 at 350.

[41] Reference Manual, *supra* note 15 at 380. See, also, *In re Bextra and Celebrex Marketing Sales Practice*, *supra* note 37.

meta-analysis combines and analyzes the data from several epidemiological studies to arrive at a single figure to represent all of the studies reviewed.[42]

If a study shows a relative risk of 2.0, "the agent is responsible for an equal number of cases of disease as all other background causes."[43] This finding "implies a 50% likelihood that an exposed individual's disease was caused by the agent."[44] If the relative risk is greater than 2.0, the study shows a greater than 50-percent likelihood that the agent caused the disease. Thus, some courts have permitted a relative risk greater than 2.0 to support an inference of specific causation.[45] Lower relative risks can also reflect general causation, but epidemiologists scrutinize weak associations because they have a greater chance of being explained by another factor or an error in the study.[46] But remember, before experts reach any type of causative conclusion based on observational studies, they rule out potential sources of error in the supporting studies.

(c) Potential Sources of Error

Researchers study a small part of the relevant population. Thus, the findings in an epidemiological study could differ from the true association in the larger population because of random variations, or chance, in the selected sample.[47] Epidemiologists refer to this problem as a "sampling error."[48] When researchers find an association (positive or negative), they use significance testing to assess the likelihood of a sampling error.[49] A

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[42] See, *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990); *Intern. Un. Loc. 68 Welf. Fund v. Merck*, 192 N.J. 372, 929 A.2d 1076 (2007).

[43] Reference Manual, *supra* note 15 at 384.

[44] *Id.*

[45] *In re Bextra and Celebrex Marketing Sales Practice*, *supra* note 37.

[46] See Reference Manual, *supra* note 15 at 377.

[47] *Id.* at 354.

[48] *Id.*

[49] See, *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990), *abrogated on other grounds, In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

statistically significant result is unlikely to be the result of random variations in a selected population sample.[50]

In evaluating whether a sampling error caused a study's results, experts often use a convention called the p-value.[51] The p-value is a calculation, based on a study's data, of the probability that a positive association in the study would have resulted from a sampling error when no real association existed.[52] If the p-value falls below a preselected, acceptable significance level, the study's results are statistically significant.[53] Epidemiologists generally consider a p-value that falls below a significance level of .05 to be statistically significant.[54] A significance level of .05 presents a 5-percent probability that researchers observed an association because of chance variations.[55]

But statistical significance addresses only the likelihood that a relative risk would have resulted from chance even if no real association existed between the disease and agent. Statistical significance does not show an association's magnitude.[56] So researchers often express a study's results through confidence intervals. Confidence intervals show the association's magnitude and how statistically stable the association is.[57]

Using the study's relative risk and preselected significance level, researchers calculate the range of values within which the study's results would likely fall if researchers repeated the study many times.[58] Graphically, the calculation is an

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[50] Reference Manual, *supra* note 15 at 396.

[51] See *id.* at 357.

[52] *Id.* See, also, David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in Reference Manual, *supra* note 14 at 156; Richard Scheines, *Causation, Statistics, and the Law*, 16 J.L. & Pol'y 135 (2007).

[53] See, Reference Manual, *supra* note 15 at 357; Scheines, *supra* note 52 at 149.

[54] See, Reference Manual, *supra* note 15 at 357-58; Scheines, *supra* note 52 at 149.

[55] See Reference Manual, *supra* note 15 at 358.

[56] See *id.* at 359.

[57] See, *id.* at 360; Kenneth J. Rothman, Modern Epidemiology 119 (1986).

[58] Reference Manual, *supra* note 15 at 360, 389.

asymmetrical bell curve around the relative risk point, showing the distribution of possible results. The confidence interval is the range of values between the boundaries of the curve on a numerical axis.[59] If researchers selected .05 for the study's significance level, then the study will show a corresponding 95-percent confidence level in the plotted confidence interval.[60] This means that

> if a confidence level of .95 is selected for a study, 95% of similar studies would result in the true relative risk falling within the confidence interval. . . . [T]he narrower the confidence interval, the greater the confidence in the relative risk estimate found in the study. Where the confidence interval contains a relative risk of 1.0, the results of the study are not statistically significant.[61]

For example, a trial judge might see a hypothetical study stating its results as follows: "relative risk of 1.6 (95% confidence interval = 1.1 to 2.4)." This statement indicates that the study's positive association (greater than 1.0) is statistically significant because the confidence interval does not include 1.0 or less. That is, the confidence interval, with 95-percent confidence, excludes the possibility of no association or a negative association. Conversely, another hypothetical study showing a "relative risk of 1.6 (95% confidence interval = 0.9 to 1.2)" is not statistically significant because the confidence interval includes the possibility that no association exists between the agent and the disease. This logic can be applied to other statistical measures of association.[62]

But significance testing shows only that random chance probably did not produce the observed association.[63] Experts

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[59] See, Reference Manual, *supra* note 15 at 361; Rothman, *supra* note 57. See, also, John F. Costello, Jr., Comment, Mandamus as a Weapon of "Class Warfare" in Sixth Amendment Jurisprudence: A Case Comment on *United States v. Santos*, 36 J. Marshall L. Rev. 733 (2003).

[60] Reference Manual, *supra* note 15 at 361; Rothman, *supra* note 57.

[61] Reference Manual, *supra* note 15 at 389.

[62] See Scheines, *supra* note 52.

[63] See, 3 David L. Faigman et al., Modern Scientific Evidence § 23:42 (2007); Scheines, *supra* note 52.

also consider whether a data collection error or design error affected the study's results. Also, they ask whether researchers failed to consider some other exposure or characteristic that varies between the groups and could explain the incidence of disease. Experts refer to these types of errors as bias and uncontrolled confounding, respectively.[64] A poorly conceived or conducted study that is statistically significant could be far less reliable than a well-conceived and conducted study that is not statistically significant.[65]

(d) Determining General Causation

While important, a positive association presents only one piece of the causation puzzle. "Once an association has been found between exposure to an agent and development of a disease, researchers consider whether the association reflects a true cause-effect relationship."[66] As noted, "[e]pidemiologists use causation to mean that an increase in the incidence of disease among the exposed subjects would not have occurred had they not been exposed to the agent."[67] But determining causation differs from the objective inquiry into relative risk. An assessment of a causal relationship is not a scientific methodology as that term is used to describe logic (like a syllogism) and analytic methods. Instead, it involves subjective judgment. Experts consider several factors under different sets of criteria that can point to causation. Relative risk presents only one factor that they consider[68]:

> Drawing causal inferences after finding an association and considering [causation] factors requires judgment and searching analysis, based on biology, of why a factor or factors may be absent despite a causal relationship, and vice-versa. While the drawing of causal inferences is

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[64] See Reference Manual, *supra* note 15 at 363-73.

[65] See, e.g., *DeLuca*, *supra* note 49.

[66] See Reference Manual, *supra* note 15 at 374.

[67] *Id.*

[68] See *id.* at 376.

> informed by scientific expertise, it is not a determination that is made by using scientific methodology.[69]

For example, government agencies and some experts use a weight-of-the-evidence methodology. That methodology comprehensively analyzes the data from different scientific fields, primarily animal tests and epidemiological studies, to assess carcinogenic risks.[70] As Justice Stevens has noted, it cannot be "intrinsically 'unscientific' for experienced professionals to arrive at a conclusion by weighing all available scientific evidence" when the Environmental Protection Agency uses this methodology to assess risks.[71] But no generally agreed-upon method exists for determining how much weight to apply to particular types of studies.[72]

Alternatively, the Reference Manual sets out the "Bradford Hill" factors that epidemiologists consider to assess general causation. The U.S. Surgeon General first suggested these criteria in 1964; in 1965, Sir Austin Bradford Hill expanded on them.[73] The factors include (1) temporal relationship, (2) strength of the association, (3) dose-response relationship, (4) replication of the findings, (5) biological plausibility, (6) consideration of alternative explanations, (7) cessation of exposure, (8) specificity of the association, and (9) consistency with other knowledge.[74] The Reference Manual explains that one or more causation factors may be absent even when a true causal relationship exists.[75] In addition, experts emphasize that

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[69] *Id.* at 375. See, also, Douglas L. Weed, *Evidence Synthesis and General Causation: Key Methods and an Assessment of Reliability*, 54 Drake L. Rev. 639 (2006).

[70] See, *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584 (D.N.J. 2002).

[71] See, *General Electric Co. v. Joiner*, 522 U.S. 136, 153-54, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997) (Stevens, J., concurring).

[72] See Weed, *supra* note 69, citing Sheldon Krimsky, *The Weight of Scientific Evidence in Policy and Law*, 95 Am. J. Pub. Health 129 (Supp. 1 2005).

[73] See Reference Manual, *supra* note 15 at 375-76.

[74] *Id.* at 375.

[75] *Id.* at 376.

> [s]ince causal actions of exposures are neither observable nor provable, a subjective element is present in judging whether, for a given exposure, such an action exists. As a result, scientists may differ both in terms of interpretation of available evidence in support of criteria used to aid causal inference, and in relative weight assigned to each criteria.[76]

Here, we comment only on the factors that could raise questions on remand.

(i) Strength of Association

Remember, regarding an association's strength, the higher the relative risk, the greater the likelihood that a relationship is causal.[77] Yet lower relative risks can reflect causality. But researchers and experts using the data will scrutinize these studies to ensure they are not attributable to uncontrolled confounding factors or biases.[78]

(ii) Dose-Response Relationship

A dose-response relationship is primarily a hallmark of toxicology.[79] If higher exposures to the agent increase the incidence of disease, the evidence strongly suggests a causal relationship.[80] "For example, lung cancer risk increases in relation to the number of cigarettes smoked per day."[81] Based on this principle, some courts have held that a plaintiff cannot recover without showing (1) the level of exposure to an agent that is dangerous to human health and (2) the plaintiff's actual exposure to a level of the defendant's toxic substance that is known to cause harm.[82]

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[76] 3 Faigman et al., *supra* note 63, § 23:45 at 263.

[77] See Reference Manual, *supra* note 15 at 376.

[78] See *id.* at 377.

[79] See *id.* at 403. See, also, *Louderback v. Orkin Exterminating Co., Inc.*, 26 F. Supp. 2d 1298 (D. Kan. 1998); David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol'y 5, 15 (2003).

[80] Reference Manual, *supra* note 15 at 377.

[81] 3 Faigman et al., *supra* note 63, § 23:45 at 262.

[82] See, e.g., *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105 (8th Cir. 1996); *Mitchell v. Gencorp Inc.*, 165 F.3d 778 (10th Cir. 1999).

In contrast, the Reference Manual states that a dose-response relationship presents strong but not essential evidence of a causal relationship.[83] Often, a physician will not have measures of the environmental exposure. An expert, however, can infer the exposure level from industrial hygiene studies or records and the patient's description of the work environment, duration of exposure, and his or her reactions.[84] Ellenbecker used this kind of data to estimate Bradley's exposure in his testimony.

Relying on the Reference Manual, the Fourth Circuit has held that precise information about the exposure necessary to cause harm and the plaintiff's exact exposure level are not always necessary "to demonstrate that a substance is toxic to humans given substantial exposure."[85] The court reasoned that in occupational settings, humans are rarely "'exposed to chemicals in a manner that permits quantitative determination of adverse outcomes.'"[86]

Similarly, the Eighth Circuit has held that a plaintiff need not produce "'"a mathematically precise table equating levels of exposure with levels of harm"'" to show that she was exposed to a toxic level of a substance.[87] The court concluded that a plaintiff's claim does not fail simply because the medical literature had not yet conclusively shown the connection between the toxic substance and the plaintiff's condition. Thus, the court held that a plaintiff adduces sufficient evidence if a reasonable person could conclude that the plaintiff's exposure probably caused her injuries.[88]

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[83] Reference Manual, *supra* note 15 at 377. See, also, *Louderback*, *supra* note 79.

[84] See Reference Manual, *supra* note 15 at 454-55.

[85] See *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 264 (4th Cir. 1999).

[86] *Id.* See, also, *Kannankeril v. Terminix Intern., Inc.*, 128 F.3d 802 (3d Cir. 1997).

[87] *Bonner*, *supra* note 12, 259 F.3d at 928, quoting *Bednar v. Bassett Furniture Mfg. Co., Inc.*, 147 F.3d 737 (8th Cir. 1998).

[88] *Id.*

We have similarly upheld an expert's reliance on evidence of the plaintiff's substantial exposure to a known toxic substance.[89] So allowing semiquantitative or qualitative estimates of exposure from occupational studies and the plaintiff's testimony seems appropriate here. The evidence shows that the safe exposure levels to diesel exhaust are set low because it can unquestionably cause some diseases.[90]

(iii) Replication of Findings

Experts also consider replication of findings in assessing causation. The Reference Manual points out that "[r]arely, if ever, does a single study conclusively demonstrate a cause-effect relationship. It is important that a study be replicated in different populations and by different investigators" before epidemiologists and other scientists accept a causal relationship.[91]

(iv) Biological Plausibility

When experts know how a disease develops, an association should show biological consistency with that knowledge.[92] But "'"[w]hat is biologically plausible depends upon the biological knowledge of the day."'"[93] An expert's inability to explain a disease's pathology or progression goes to the weight of the evidence, not to its admissibility.[94]

With these principles and terms in mind, we turn to the parties' contentions, the legal standards for determining the reliability of expert opinion testimony generally, and the standards for determining the reliability of epidemiological expert opinion.

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[89] See *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997).

[90] See Eaton, *supra* note 79.

[91] Reference Manual, *supra* note 15 at 377.

[92] See *id.* at 378.

[93] *Marcum v. Adventist Health System/West*, 345 Or. 237, 193 P.3d 1, (2008), quoting Sir Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 Proc. R. Soc. Med. 295 (1965).

[94] See *Marcum*, *supra* note 93.

3. Parties' Contentions

The district court did not have the benefit of our decision in *Epp v. Lauby*.[95] In *Epp*, we clarified that when an expert bases his or her opinion on a reliable methodology, a court should not exclude it solely because a disagreement exists between the parties' qualified experts. King contends that under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[96] it is unreasonable to require experts to present peer-reviewed studies with absolute conclusions on causation because scientific studies do not address absolute causation. BNSF counters that the court simply found no reliable support for Frank's opinion because of studies on which he relied.

[9] As we know, to recover for exposure to a toxic substance in a FELA action, an employee must present expert testimony evidence supporting an inference that the employee's injuries were caused by exposure to the substance attributable to the railroad's negligent act or omission.[97]

4. General Admissibility Standards for Expert Testimony

[10,11] Before admitting expert opinion testimony under Neb. Evid. R. 702,[98] a trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert.[99] If the opinion involves scientific or specialized knowledge, trial courts must also determine whether the reasoning or methodology underlying the expert's opinion is scientifically valid.[100] Under *Daubert*, evidentiary reliability depends on scientific validity.[101] Normally, after a

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[95] *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

[96] See *Daubert, supra* note 2.

[97] See *McNeel, supra* note 9.

[98] Neb. Rev. Stat. § 27-702 (Reissue 2008).

[99] See, *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006); *Carlson, supra* note 11.

[100] *Epp, supra* note 95; *Mason, supra* note 99.

[101] See *McNeel, supra* note 9, citing *Daubert, supra* note 2.

court finds that the expert's methodology is valid, it must also determine whether the expert reliably applied the methodology.[102] Finally, under Neb. Evid. R. 403,[103] the court weighs whether the expert's evidence and opinions are more probative than prejudicial.[104]

[12] Here, the parties do not dispute Frank's qualification to give expert medical testimony or to interpret epidemiological studies. We see the broad issue as whether under our *Daubert*/*Schafersman* framework, Frank based his opinion on a reliable, or scientifically valid, methodology. Under that framework, the proponent of expert testimony must answer two preliminary questions by a preponderance of the evidence. First, is the expert's reasoning or methodology underlying his or her testimony scientifically valid? Second, can the finder of fact properly apply that reasoning or methodology to the facts?[105]

[13] In determining the admissibility of an expert's opinion, the court must focus on the validity of the underlying principles and methodology—not the conclusions that they generate.[106] And reasonable differences in scientific evaluation should not exclude an expert witness' opinion.[107] The trial court's role as the evidentiary gatekeeper is not intended to replace the adversary system but to ensure that "'an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant

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[102] See, *Epp, supra* note 95; *Mason, supra* note 99; *Carlson, supra* note 11. But see *McNeel, supra* note 9.

[103] Neb. Rev. Stat. § 27-403 (Reissue 2008).

[104] See, *Epp, supra* note 95; *Mason, supra* note 99.

[105] See, *Daubert, supra* note 2; *McNeel, supra* note 9. See, also, *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001); *Sigler v. American Honda Motor Co.*, 532 F.3d 469 (6th Cir. 2008); *Lauzon v. Senco Products, Inc.*, 270 F.3d 681 (8th Cir. 2001); *Cook ex rel. Tessier v. Sheriff of Monroe County*, 402 F.3d 1092 (11th Cir. 2005).

[106] See, *Daubert, supra* note 2; *Schafersman, supra* note 2.

[107] See *Schafersman, supra* note 2.

field.'"[108] In sum, while the trial court acts as the evidentiary gatekeeper, it is not a goalkeeper.

[14,15] But a trial court has discretion to exclude expert testimony if "there is simply too great an analytical gap between the data and the opinion proffered."[109] An expert's opinion must be based on good grounds, not mere "subjective belief or unsupported speculation."[110] "Good grounds" mean an inference or assertion derived by scientific method and supported by appropriate validation.[111] "[T]he expert must have 'good grounds' for his or her belief" in every step of the analysis.[112] Yet courts should not require absolute certainty.[113] "[A] trial court should admit expert testimony 'if there are "good grounds" for the expert's conclusion' notwithstanding the judge's belief that there are better grounds for some alternative conclusion."[114]

5. Reliability Factors

[16] We have previously set out the factors for assessing the reliability or scientific validity of an expert's opinion. The factors are whether (1) the theory or technique can be, or has been, tested; (2) the theory or technique has been subjected to peer review and publication; (3) there is a known or potential rate of error; (4) there are standards controlling the technique's operation; and (5) the theory or technique enjoys general acceptance within the relevant scientific community.[115]

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[108] See *Schafersman, supra* note 8, 268 Neb. at 148, 681 N.W.2d at 55, quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

[109] *Joiner, supra* note 71, 522 U.S. at 146.

[110] *Daubert, supra* note 2, 509 U.S. at 590.

[111] *Id.*

[112] *In re Paoli R.R. Yard PCB Litigation, supra* note 49, 35 F.3d at 742, quoting *Daubert, supra* note 2.

[113] See, *Daubert, supra* note 2; *Epp, supra* note 95.

[114] *Magistrini, supra* note 70, 180 F. Supp. 2d at 595, quoting *Heller v. Shaw Industries, Inc.*, 167 F.3d 146 (3d Cir. 1999).

[115] See, *Epp, supra* note 95; *Carlson, supra* note 11.

[17] But these nonexclusive reliability factors do not bind a trial court. And as we have previously stated, additional factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.[116] Under the *Daubert*/*Schafersman* framework, a trial court should not require general acceptance of the causal link between an agent and a disease or condition if the expert otherwise bases his or her opinion on a reliable methodology.[117]

[18] Here, Frank had not published his opinion that diesel exhaust can cause multiple myeloma and had not personally conducted research on this subject. These factors are relevant, but not fatal.[118] Absent evidence that an expert's testimony grows out of the expert's own prelitigation research or that an expert's research has been subjected to peer review, experts must show that they reached their opinions by following an accepted scientific method or procedure as it is practiced by others in their field.[119]

[19] Epidemiological statistical techniques for testing a causation theory have been subject to peer review and are generally accepted in the scientific community.[120] The studies Frank relied upon were subject to peer review, and the researchers did not develop the statistical techniques used in the studies for this litigation. Often, a medical expert's reliance on peer-reviewed literature can appropriately support a general causation opinion.[121] And once the expert has established that he or she reliably assessed the data, the weight of the expert's conclusion is an issue for the jury to resolve. Accordingly, the district court needed to consider only two issues regarding Frank's opinion

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[116] *Epp, supra* note 95; *Carlson, supra* note 11; *Schafersman, supra* note 2.

[117] See *Epp, supra* note 95.

[118] See *Daubert, supra* note 2.

[119] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir. 1995).

[120] See, e.g., *Goebel, supra* note 12; *In re Silicone Gel Breast Impl. Prod. Liab. Lit., supra* note 35; *Epp, supra* note 95.

[121] See, e.g., *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996); *Goebel, supra* note 12.

on general causation. Were the results of the epidemiological studies Frank relied on sufficient to support his opinion regarding general causation? And did he review the scientific literature or data in a reliable manner? In other words, did too great an analytical gap exist between the data and Frank's opinion? To determine the appropriate standard for this question, we look to Neb. Evid. R. 703.[122]

6. Exclusion Test for Expert's Unreasonable Reliance on Underlying Studies

[20] In *Daubert*, the Court required trial judges assessing a proffer of expert scientific testimony under Fed. R. Evid. 702 to consider other evidentiary rules.[123] The Court specifically mentioned Fed. R. Evid. 703, which contains the same language as Nebraska's rule 703.[124] The Court stated that under federal rule 703, "expert opinions based on otherwise inadmissible hearsay are to be admitted only if the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'"[125] Relying on this language, many courts dealing with professional studies have adopted the following standard for a court's exclusion of expert's opinion: "If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded."[126]

We agree with this general standard. We next set out the standards for its application more fully.

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[122] See Neb. Rev. Stat. § 27-703 (Reissue 2008).

[123] See *Daubert*, *supra* note 2.

[124] See § 27-703. See, also, *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[125] *Daubert*, *supra* note 2, 509 U.S. at 595.

[126] *In re Agent Orange Product Liability Lit.*, 611 F. Supp. 1223, 1245 (D.C.N.Y. 1985). Accord, e.g., *In re Paoli R.R. Yard PCB Litigation*, *supra* note 42; *Bouchard v. American Home Products Corp.*, 213 F. Supp. 2d 802 (N.D. Ohio 2002); *Smith v. Ortho Pharmaceutical Corp.*, 770 F. Supp. 1561 (N.D. Ga. 1991); *Havner*, *supra* note 19.

7. Standards for Determining the Reliability of Epidemiological Opinion Testimony

Although we have discussed epidemiological evidence in two other cases,[127] we do not consider either case controlling here. In neither case did we discuss what epidemiological studies must show to support an expert's general causation opinion based primarily on such evidence.

Since *Daubert*, assessing expert opinion testimony based on epidemiological evidence is an area of law that is still in flux. Despite these shifting sands, we set out four broad standards to assist trial courts in determining the reliability of expert testimony based on epidemiological evidence.

(a) Strength of Association

Scientists' determinations of causation are inherently tentative because they must always remain open to future knowledge.[128] Generally, researchers conservatively assess causal relationships, and they often call for stronger evidence and more research before drawing a conclusion.[129] One study of a particular population sample would not normally contain a conclusion on a causal relationship.[130] So how strong must a relative risk be before an expert can rely on it to support a general causation opinion?

We acknowledge that courts disagree on the appropriate relative risk threshold that a study must satisfy to support a general causation theory. Some courts have required a study to have a relative risk of 2.0 or greater to support a causation opinion.[131]

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[127] See, *Schafersman*, *supra* note 2; *Epp*, *supra* note 95.

[128] Reference Manual, *supra* note 15 at 374. See, also, *Daubert*, *supra* note 2.

[129] Reference Manual, *supra* note 15 at 375.

[130] See *id.* See, also, *Berry v. CSX Transp., Inc.*, 709 So. 2d 552 (Fla. App. 1998).

[131] See, e.g., *DeLuca*, *supra* note 49; *Daubert*, *supra* note 119; *In re Breast Implant Litigation*, 11 F. Supp. 2d 1217 (D. Colo. 1998). See, also, Russellyn S. Carruth & Bernard D. Goldstein, *Relative Risk Greater Than Two in Proof of Causation in Toxic Tort Litigation*, 41 Jurimetrics J. 195 (2001); Reference Manual, *supra* note 15 at 359 n.73 (citing cases).

These courts have generally reasoned that "'a relative risk greater than "2" means that the disease more likely than not was caused by the event [under investigation].'"[132] Namely, they equate the relative risk requirement to a plaintiff's preponderance burden of proof in tort cases. Yet, in many of these cases, the courts failed to distinguish between general causation and its brother, specific causation. Moreover, epidemiological evidence appears to have been the only evidence supporting specific causation.[133] One of these courts, the Ninth Circuit, later reversed its position for claims in which the investigated substance is known to cause many adverse health effects.[134] For this type of claim, the Ninth Circuit now applies the "capable of causing" standard for evidence supporting general causation, instead of the doubling of the risk standard it had applied in two earlier cases.[135]

Other courts have similarly recognized that relative risk less than 2.0 can support an expert's general causation opinion.[136] In contrast, the 11th Circuit has held that a district court did not abuse its discretion in finding that a relative risk of 1.24 was insufficient to support a general causation opinion.[137]

Despite this disagreement among the courts, we believe that requiring a study to show a relative risk of 2.0 or greater is too restrictive when the expert relies on the study to support an opinion on general causation. As noted, some courts have held that a relative risk above 2.0 is even sufficient to support

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[132] *DeLuca, supra* note 49, 911 F.2d at 959 (emphasis omitted), quoting *Manko v. United States*, 636 F. Supp. 1419 (W.D. Mo. 1986).

[133] See, e.g., *DeLuca, supra* note 49; *Daubert, supra* note 119.

[134] See *In re Hanford Nuclear Reservation Litigation, supra* note 12.

[135] *Id.* at 1134.

[136] See, *In re Joint Eastern & Southern Dist. Asbestos Lit., supra* note 17; *In re Bextra and Celebrex Marketing Sales Practice, supra* note 37; *In re Silicone Gel Breast Impl. Prod. Liab. Lit., supra* note 35; *Miller v. Pfizer, Inc.*, 196 F. Supp. 2d 1062 (D. Kan. 2002); *Pick v. American Medical Systems*, 958 F. Supp. 1151 (E.D. La. 1997). See, also, *Magistrini, supra* note 70; *Grassis v. Johns-Manville Corp.*, 248 N.J. Super. 446, 591 A.2d 671 (1991). Compare *Ambrosini, supra* note 121.

[137] See *Allison v. McGhan Medical Corp.*, 184 F.3d 1300 (11th Cir. 1999).

an opinion on specific causation: that is, sufficient to support an inference that an agent caused the particular plaintiff's disease.[138] And, remember, weak associations can indicate a causal relationship, depending upon the presence of other factors.[139] Finally, some experts have stated that workplace studies can understate the true relative risk of toxic exposures. They have questioned the validity of requiring a relative risk greater than 2.0 to show general causation.[140]

[21] So we decline to set a minimum threshold for relative risk, or any other statistical measurement, above the minimum requirement that the study show a relative risk greater than 1.0. We agree that "it would be far preferable for the district court to instruct the jury on statistical significance and then let the jury decide whether many studies over the 1.0 mark have any significance in combination."[141] In short, the significance of epidemiological studies with weak positive associations is a question of weight, not admissibility.[142]

(b) Ruling Out Potential Sources of Error

Likewise, disagreements exist among courts regarding the importance of statistical significance. Some courts have required the relative risk in epidemiological studies to be statistically significant.[143] And the U.S. Supreme Court affirmed a district court's exclusion of an expert's opinion, in part, because one supporting study failed to find an association between the

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[138] See, Reference Manual, *supra* note 15 at 384; *In re Bextra and Celebrex Marketing Sales Practice, supra* note 37; *In re Silicone Gel Breast Impl. Prod. Liab. Lit., supra* note 35.

[139] See, Reference Manual, *supra* note 15 at 376; Rothman, *supra* note 57. See, also, *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

[140] See, e.g., Carruth & Goldstein, *supra* note 131.

[141] See *In re Joint Eastern & Southern Dist. Asbestos Lit., supra* note 17, 52 F.3d at 1134 (emphasis omitted).

[142] See *id.*

[143] See, *In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999); *DeLuca, supra* note 49; *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 884 F.2d 167 (5th Cir. 1989); *Magistrini, supra* note 70. See, also, Reference Manual, *supra* note 15 at 359 n.73 (citing cases).

agent and the disease and another study failed to show that the increased risk of the disease was statistically significant.[144]

[22] We agree that statistical significance is the most obvious way for a court to determine that researchers properly ruled out random variations in the population sample accounting for the result. But those decisions requiring a study's relative risk to be statistically significant have come under fire. Experts have pointed out that the lack of statistical significance does not demonstrate that there is no relationship.[145] So not all courts impose a requirement of statistical significance.[146] We also decline to impose a statistical significance requirement if an expert shows that others in the field would nonetheless rely on the study to support a causation opinion and that the probability of chance causing the study's results is low.

[23] We also recognize that bias and uncontrolled confounding can present serious flaws in a study. But, as a practical matter, we do not expect trial courts to delve into every possible error in an expert's underlying data unless a party raises it:

> [W]here one party alleges that an expert's conclusions do not follow from a given data set, the responsibility ultimately falls on that challenging party to inform (via the record) those of us who are not experts on the subject with an understanding of precisely how and why the expert's conclusions fail to follow from the data set.[147]

[24] Moreover, no study is without some errors of this nature and many prove inconsequential.[148] Thus, a court should

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[144] *Joiner, supra* note 71.

[145] See, *DeLuca, supra* note 49; Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 Nw. U. L. Rev. 643 (1992). See, also, Rothman, *supra* note 57.

[146] See, e.g., *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (6th Cir. 1992); *Philip Morris USA, Inc., supra* note 139; *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984), *reversed on other grounds* 816 F.2d 1417 (10th Cir. 1987); *Berry, supra* note 130.

[147] *Goebel, supra* note 12, 346 F.3d at 990. Accord *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[148] See, *Berry, supra* note 130; 3 Faigman et al., *supra* note 63, § 23:34; Reference Manual, *supra* note 15 at 363, 365, 369, 395.

normally not question a published epidemiological study's results over the mere possibility of error unless the study's findings plausibly appear attributable to unrecognized error.[149]

(c) Number of Studies

[25] Epidemiological studies assume an important role in determining causation when they are available, and particularly when they are numerous and span a significant period.[150] Courts should normally require more than one epidemiological study showing a positive association to establish general causation, because a study's results must be capable of replication.[151] But courts are understandably reluctant to set a specified minimum number of studies showing a positive association before an expert can reliably base an opinion on them—particularly when there are other, nonepidemiological studies also supporting the expert's opinion.[152]

But we do not preclude a trial court from considering as part of its reliability inquiry whether an expert has cherry-picked a couple of supporting studies from an overwhelming contrary body of literature. Here, however, we need not determine whether Frank relied on a sufficient number of epidemiological studies. While BNSF contests Frank's studies on other grounds, it acknowledges that several studies have shown positive associations between multiple myeloma and exposure to diesel exhaust or benzene.[153]

(d) Method for Reliably Analyzing Body of Evidence

[26] A meta-analysis of observational studies can present problems if the methodologies used in the combined studies

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[149] Reference Manual, *supra* note 15 at 372.

[150] See, *Richardson by Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988); *In re Silicone Gel Breast Impl. Prod. Liab. Lit.*, *supra* note 35.

[151] See Reference Manual, *supra* note 15 at 377.

[152] See, e.g., *Ambrosini*, *supra* note 121; *In re Joint Eastern & Southern Dist. Asbestos Lit.*, *supra* note 17.

[153] See *Beck v. Koppers, Inc.*, No. 3:03 CV 60 P D, 3:04 CV 160 P D, 2006 WL 270260 (N.D. Miss. Feb. 2, 2006) (unpublished decision).

differ.[154] Thus, if an epidemiological expert has performed or relied on an unpublished meta-analysis of observational studies, the expert should show the methodology used is generally accepted in the field. Similarly, if an expert's causation opinion has not been subjected to peer review, the expert should explain the accepted criteria that he or she has used to conclude that an agent can cause the plaintiff's disease in the general population[155]: e.g., the Bradford Hill criteria or another set of criteria for determining causal relationships.

Having determined the basic reliability standards for an expert's general causation opinion based on epidemiological evidence, we now decide whether the district court applied the proper standard.

8. District Court Improperly Required Studies to Show Definite Conclusion on Causation

[27] We believe the district court erred in concluding that Frank's causation opinion was unreliable because Frank could not "point to a study that concludes exposure to diesel exhaust causes multiple myeloma." As explained, individual epidemiological studies need not draw definitive conclusions on causation before experts can conclude that an agent can cause a disease.[156] If the expert's methodology appears otherwise consistent with the standards set out above, the court should admit the expert's opinion. But here, the court did not inquire into Frank's methodology.

Instead, the court summarily dismissed Frank's testimony as showing his reliance "on the 'totality of information regarding multiple myeloma, benzene and diesel exhaust' to reach his own subjective conclusions." Yet Frank, while admitting that studies existed finding no relationship, testified that a body of evidence supported his conclusion that diesel exhaust can cause multiple myeloma. The evidence he cited included human data studies, animal studies, and toxicology studies. Contrary to the district court's finding, Frank's testimony did not reflect a

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[154] See Reference Manual, *supra* note 15 at 361 n.76 & 380.

[155] See *Daubert*, *supra* note 119.

[156] See *Ambrosini*, *supra* note 121.

disconnect between an expert opinion and the underlying data. Frank's inquiry required him to consult the relevant scientific literature and draw a conclusion. We recognize that we have not previously set out legal standards for trial courts to follow in these cases. But, here, the court only considered whether the studies Frank relied upon showed a definite conclusion on a causal relationship. The court erred in applying a "conclusive study" standard.

It is true that King's evidence has some deficiencies. For some of the supporting studies Frank relied on, King only submitted to the court an abstract, or synopsis, of the study. And Frank failed to explain the criteria he used to reach his conclusion on causation. But these failures do not prove fatal here.

Although Frank did not personally conduct studies on the relationship between diesel exhaust and multiple myeloma, he was qualified to interpret studies on that relationship. And his reasoning appears consistent with the causation criteria discussed above. More important, these deficiencies played no role in the district court's decision because it only considered whether a study's results showed a conclusive causal relationship. We reverse the decision of the Court of Appeals with directions to remand the cause to the district court for further proceedings, and the parties can present methodology evidence on remand.

We recognize that a court's wrestling with this type of evidence is no small task. On remand, however, the district court may conduct a *Daubert*/*Schafersman* hearing. It should resolve any questions that it has or that BNSF raises regarding the sufficiency of the underlying studies or the reliability of Frank's opinion testimony. But the court should remember that regarding the sufficiency of the underlying studies, it should focus on whether no reasonable expert would rely on the studies to find a causal relationship—not whether the parties dispute their force or validity. And regarding the admissibility of Frank's opinion, the focus must be on the validity of his methodology and whether good grounds exist for his opinion—not whether his ultimate conclusion differs from that of other experts.[157]

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[157] See, *Daubert*, *supra* note 2; *Epp*, *supra* note 95.

9. Specific Causation

As discussed, the district court also determined that Frank's differential etiology proved unreliable. We pause here to note that courts, including this court, have not always been careful to distinguish between differential diagnosis and differential etiology. But differential diagnosis refers to a physician's "determination of which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their clinical findings."[158] In contrast, etiology refers to determining the causes of a disease or disorder.[159]

The court gave three reasons for its conclusion: (1) The record did not show what causes "other th[a]n diesel exhaust exposure" Frank considered in his differential etiology; (2) "Frank 'ruled in' diesel exhaust exposure as a possible cause, even though no medical or scientific study concluded that such exposure causes multiple myeloma"; and (3) Frank failed to explain why he "'ruled out'" any other potential causes.

[28-30] If an expert's general causation opinion is admissible to show that a suspected agent should be ruled in as a possible cause of the plaintiff's disease, the court must next determine whether the expert performed a reliable differential etiology.[160] To perform a reliable differential etiology, a medical expert must first compile a comprehensive list of hypotheses that might explain the set of salient clinical findings under consideration.[161] At the ruling-in stage of the analysis, an expert's opinion is not reliable if the expert considers a suspected agent that cannot cause the patient's disease.[162] Nor is the opinion reliable if the expert "completely fails to consider a cause that could explain the patient's symptoms."[163]

[31] Next, the expert engages in a process of elimination, based on the evidence, to reach a conclusion regarding the

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[158] Dorland's Illustrated Medical Dictionary 458 (28th ed. 1994).

[159] See *id.* at 585.

[160] See *Carlson*, *supra* note 11.

[161] See *id.*

[162] See *id.*

[163] *Id.* at 414, 675 N.W.2d at 105 (emphasis omitted).

most likely cause of the disease.[164] At the ruling-out stage of the analysis, the court should focus on whether the expert had a reasonable basis for concluding that one of the plausible causative agents was the most likely culprit for the patient's symptoms.[165] The expert must have good grounds for eliminating potential hypotheses.[166] Unsupported speculation will not suffice.[167] But "[w]hat constitutes good grounds for eliminating other potential hypotheses will vary depending upon the circumstances of each case."[168]

Under this framework, the district court's first reason was incorrect. Frank's testimony shows that he considered other possible causes of multiple myeloma, including radiation exposure, diabetes, pesticide exposure, and cigarette smoking. The court's second rationale also proves incorrect. Here, the court relied on its finding that Frank improperly ruled in diesel exhaust exposure as the cause of Bradley's cancer "even though no medical or scientific study authorizes such a conclusion." We have already determined that the court applied an erroneous standard in ruling that Frank lacked good grounds for believing that Bradley's exposure to diesel exhaust likely caused his multiple myeloma.

[32] Finally, the court incorrectly determined that Frank failed to give reasons for ruling out other possible hypotheses. Frank ruled out diabetes and radiation exposure based on Bradley's medical and personal history. In performing a differential etiology, a decision to eliminate an alternative hypothesis based on information gathered by using the traditional tools of clinical medicine will usually have the hallmarks of reliability required under the *Daubert*/*Schafersman* framework. These tools include physical examinations, medical and personal histories, and medical testing.[169]

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[164] See *id.*

[165] *Id.*

[166] See *id.*

[167] *Id.*

[168] *Id.* at 414-15, 675 N.W.2d at 106.

[169] *Carlson*, *supra* note 11; Mary Sue Henifin et al., *Reference Guide on Medical Testimony*, in Reference Manual, *supra* note 14 at 439, 452-53.

[33] Frank explained his reasons for ruling out Bradley's possible pesticide exposure as a teenager and his cigarette smoking. Frank had reviewed epidemiological studies of these agents and believed that they failed to show a causal relationship with multiple myeloma. We emphasized in *Carlson v. Okerstrom* that the traditional tools for ruling out potential hypotheses in a differential etiology are "just guideposts and that often, an expert's decision to rule out an alternative hypothesis will depend on other factors for which clear rules are not available."[170]

Here, the evidence does not show that Frank failed to consider other possible hypotheses for Bradley's cancer or to explain why his causation opinion was sound despite BNSF's suggestions of alternative hypotheses. Thus, BNSF's alternative suggestions affect the weight, not the admissibility, of Frank's testimony.[171] Accordingly, on remand, the primary admissibility issue for Frank's opinion on specific causation is whether he had good grounds for ruling in Bradley's diesel exhaust exposure as a plausible cause of his cancer.

VI. CONCLUSION

We conclude that the district court applied an erroneous standard for excluding an expert's opinion testimony based on epidemiological studies. Thus, the summary judgment was improper. We therefore reverse the decision of the Court of Appeals which affirmed the district court's decision. We remand the cause to the Court of Appeals with directions to remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEPHAN, J., not participating.

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[170] *Carlson, supra* note 11, 267 Neb. at 415, 675 N.W.2d at 106.

[171] See, *In re Paoli R.R. Yard PCB Litigation, supra* note 49; *Heller, supra* note 114; *Westberry, supra* note 85.

STATE OF NEBRASKA AND THE NEBRASKA STATE PATROL, APPELLEES, V. ROBERT HENDERSON AND THE STATE LAW ENFORCEMENT BARGAINING COUNCIL, APPELLANTS.

762 N.W.2d 1

Filed February 27, 2009. No. S-07-010.

1. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. **Arbitration and Award: Contracts.** Arbitration is not a judicial proceeding; it is purely a matter of contract.
3. **Arbitration and Award: Federal Acts: Contracts.** Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce; otherwise, it is governed by Nebraska's Uniform Arbitration Act.
4. **Arbitration and Award: Contracts: Appeal and Error.** Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. A court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one.
5. **Arbitration and Award: Public Policy.** A court may refuse to enforce an arbitration award that is contrary to a public policy that is explicit, well defined, and dominant. Such a public policy must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests, but the arbitration award need not itself violate positive law to be unenforceable as against public policy.
6. **Public Policy: Discrimination.** It is an explicit, well-defined, and dominant public policy of the State of Nebraska that the laws of Nebraska should be enforced without racial or religious discrimination.
7. **Public Policy: Public Officers and Employees: Discrimination.** Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Vincent Valentino for appellants.

Jon Bruning, Attorney General, and Tom Stine for appellees.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., and Lawrence P. Schneider, of Knaggs, Harter, Brake & Schneider, P.C., for amicus curiae National Troopers Coalition.

Aaron Nisenson, of International Union of Police Associations, AFL-CIO, and Jane Burke, of Keating, O'Gara, Nedved & Peter, P.C., for amicus curiae International Union of Police Associations, AFL-CIO.

David J. Kramer and Quinn Vandenberg, of Baird, Holm, L.L.P., and Clare Pinkert, Steven C. Sheinberg, Steven M. Freeman, and Deborah R. Cohen, of Anti-Defamation League, for amicus curiae Anti-Defamation League.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

GERRARD, J.

From its very inception, the State of Nebraska has been founded upon principles of equality and tolerance that the Ku Klux Klan, from its very inception, has used violence and terror to oppose. When Robert Henderson, a veteran trooper of the Nebraska State Patrol, joined the Ku Klux Klan, he voluntarily associated himself with an organization that is expressly opposed to Nebraska's founding principles. To reinstate Henderson as a sworn officer of the Nebraska State Patrol would violate this state's explicit, well-defined, dominant public policy. For that reason, we affirm the district court's decision to vacate an arbitration award in Henderson's favor.

BACKGROUND

On November 1, 2005, an internal affairs investigator for the Nebraska State Patrol was informed that a member of the State Patrol might be participating in online discussions at a members-only Web site associated with the Ku Klux Klan. An investigation was commenced which revealed that appellant Henderson had joined the Knights Party, a Ku Klux Klan-affiliated organization, and participated in online discussions in a Knights Party online discussion forum. The investigating officer found that Henderson's membership reflected

negatively on the State Patrol and brought the State Patrol into disrepute.

Henderson was fired for his activities, and the State Law Enforcement Bargaining Council (SLEBC) filed a grievance on Henderson's behalf, pursuant to the relevant collective bargaining agreement (CBA). When the grievance was not resolved, it was submitted to binding arbitration pursuant to the CBA. The arbitrator determined that the firing violated the CBA, because, according to the arbitrator, the State Patrol had violated Henderson's constitutional rights, and did not have "just cause" for terminating his employment under the CBA. The arbitrator ordered that Henderson be reinstated to his previous duties. The State Patrol, pursuant to Nebraska's Uniform Arbitration Act,[1] filed an application in the district court to vacate the award.[2] The district court granted the application to vacate the award, finding that the award violated "a well-defined and dominant public policy of this state." Henderson and SLEBC appeal.

ASSIGNMENT OF ERROR

Henderson and SLEBC assign, restated and consolidated, that the district court erred in vacating the arbitrator's award and instead should have confirmed the award.

We note the State Patrol's argument that Henderson lacks standing to prosecute this appeal. But while the original notice of appeal in this case was filed by Henderson, an amended notice of appeal was timely filed on behalf of Henderson and SLEBC. The State Patrol concedes that SLEBC has standing to appeal. Therefore, we do not address Henderson's standing, because all the issues raised by him have also been raised by SLEBC.

STANDARD OF REVIEW

[1] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a

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[1] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2008).

[2] See § 25-2613.

conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[3]

ANALYSIS

Nature and Principles of Arbitration

[2] Arbitration is not a judicial proceeding; it is purely a matter of contract.[4] In this case, the CBA between the State Patrol and SLEBC provides that if an employee's grievance is not satisfactorily resolved, it may be referred to arbitration. The parties in this case do not dispute that Henderson's grievance was properly submitted to arbitration.

[3] Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce[5]; otherwise, it is governed by Nebraska's Uniform Arbitration Act.[6] In this case, there is no claim that the transaction involved interstate commerce, so Nebraska law applies. We note, however, that because the applicable provisions of the Uniform Arbitration Act and the Federal Arbitration Act are similar, we look to federal case law explaining the scope of judicial review of arbitration awards.

We have explained that judicial review of an arbitrator's award is severely circumscribed.[7] Appellate review of an arbitrator's award is necessarily limited because "'to allow full

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[3] *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003). See, also, e.g., *PaineWebber, Inc. v. Agron*, 49 F.3d 347 (8th Cir. 1995); *C.R. Klewin Northeast v. City of Bridgeport*, 282 Conn. 54, 919 A.2d 1002 (2007) (determination of whether arbitration award violates public policy is reviewed de novo by appellate court).

[4] See *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002).

[5] See 9 U.S.C. §§ 1 to 16 (2006). See, also, *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984); *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998).

[6] §§ 25-2601 to 25-2622. See *Hartman, supra* note 3.

[7] *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001), citing *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir. 1998).

scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.'"[8] Strong deference is due an arbitrative tribunal.[9]

[4] And when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process.[10] Because the parties to a collective bargaining agreement have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept.[11] Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.[12] In other words, a court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one.[13]

Therefore, in this case, we do not revisit the arbitrator's factual findings, interpretation of the CBA, or ultimate conclusion that the State Patrol violated the CBA in its termination of Henderson's employment. Nor do we revisit the arbitrator's discussion of constitutional issues, although his conclusions on those issues are highly suspect.[14] The State Patrol does not contend, nor is there any basis in the record to conclude, that any of the statutory bases under the Uniform Arbitration Act for vacating an arbitration award are

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[8] *Jones, supra* note 7, 262 Neb. at 798, 635 N.W.2d at 271.

[9] *Id*.

[10] *Id*., citing *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410 (11th Cir. 1990).

[11] *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

[12] *Id*.

[13] See *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983).

[14] See, e.g., *Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir. 1998); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985).

applicable in this case.[15] Instead, the issue in this appeal is whether the district court correctly determined that the arbitrator's award can be vacated, as the State Patrol contends, because reinstating Henderson to the State Patrol would be contrary to public policy.

In that regard, we note that the sole matter submitted to the arbitrator for disposition was, "Did the Nebraska State Patrol violate the [CBA] or its own operating procedures or policies when it disciplined the Grievant, . . . Henderson, on March 15, 2006? If so, what shall be the remedy?" The issue submitted for arbitration was consistent with the CBA, which defines a "grievance" subject to arbitration as "a claimed breach, misinterpretation, or misapplication of the terms of this Agreement." The arguments of the parties, and the decision of the arbitrator, touch on constitutional issues. But we view those issues, in light of the scope of the CBA and arbitration agreement, to be subsumed in the question whether the CBA was violated—and thus in the question whether the remedy for that violation violates public policy. In other words, we do not view this case as presenting a civil rights claim and do not address what remedy, if any, might be appropriate for any alleged violation of Henderson's constitutional rights. We note that compensatory damages might be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy.[16] But the only issue before the arbitrator in this case was the application of the CBA, and the only issue before this court is whether the arbitrator's remedy for violation of the CBA is enforceable.

Public Policy Exception

We have not previously addressed whether an arbitration award, under the Uniform Arbitration Act, can be vacated by a court on public policy grounds. The State Patrol argues that we should adopt such a doctrine, using the reasoning

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[15] See § 25-2613(a).

[16] See *W. R. Grace & Co., supra* note 13.

of the U.S. Supreme Court in cases such as *W. R. Grace & Co.*[17]; *Misco, Inc.*[18]; and *Eastern Associated Coal Corp. v. Mine Workers*.[19]

In *W. R. Grace & Co.*, an arbitrator found that an employer had unlawfully laid off employees in violation of a collective bargaining agreement, despite the fact that the employer had been attempting to comply with a conciliation agreement with the Equal Employment Opportunity Commission. The employer sought to vacate the arbitrator's award on the ground that it violated public policy. Although the U.S. Supreme Court rejected the claim that the arbitrator's interpretation of the collective bargaining agreement violated public policy, the Court recognized:

> [A] court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[20]

The Court extended that reasoning in *Misco, Inc.*,[21] in which a machine operator had been fired after marijuana was found in his home and in his vehicle parked in his employer's parking lot. An arbitrator ordered the employee reinstated with backpay, reasoning that the evidence did not establish that he had used or possessed marijuana on company property, in violation of company policy. The federal district court declined to enforce the award, and the Fifth Circuit affirmed the district court's conclusion that "reinstatement would violate the public

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[17] *Id.*

[18] *Misco, Inc.*, *supra* note 11.

[19] *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

[20] *W. R. Grace & Co.*, *supra* note 13, 461 U.S. at 766 (citations omitted).

[21] *Misco, Inc.*, *supra* note 11.

policy 'against the operation of dangerous machinery by persons under the influence of drugs or alcohol.'"[22]

The Court explained that "[a] court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."[23] That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and the doctrine is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.[24] In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.[25]

But, the Court cautioned, while a court may not enforce a collective bargaining agreement that is contrary to public policy, a court's refusal to enforce an arbitrator's interpretation of a collective bargaining agreement "is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'"[26] Thus, the Court explained,

> [t]wo points follow from our decision in *W. R. Grace*.[27] First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction

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[22] *Id.*, 484 U.S. at 35.

[23] *Id.*, 484 U.S. at 42.

[24] *Id.*

[25] *Id.*

[26] *Id.*, 484 U.S. at 43.

[27] *W. R. Grace & Co., supra* note 13.

> a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." . . . At the very least, an alleged public policy must be properly framed under the approach set out in *W. R. Grace*,[28] and the violation of such a policy must be clearly shown if an award is not to be enforced.[29]

Based on that holding, the Court concluded:

> [T]he formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" . . . The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W. R. Grace*[30] that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.[31]

The Court further explained that even if the Fifth Circuit's formulation of public policy was accepted, no violation of that public policy had been shown, because the marijuana found in the employee's home and car did not establish that his reinstatement violated a public policy against the operation of dangerous machinery by persons actually under the

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[28] *Id.*

[29] *Misco, Inc.*, *supra* note 11, 484 U.S. at 43.

[30] *W. R. Grace & Co.*, *supra* note 13.

[31] *Misco, Inc.*, *supra* note 11, 484 U.S. at 44.

influence of drugs. That conclusion, the Court reasoned, rested on assumptions that were insufficient to support vacating the award and inconsistent with the factual findings made by the arbitrator.[32]

The Court elaborated upon those principles in *Eastern Associated Coal Corp.*,[33] in which the lower courts had refused to vacate an arbitration award ordering reinstatement of a truck-driver who had tested positive for marijuana. The Court framed the issue presented in the case as "not whether [the employee's] drug use itself violates public policy, but whether the agreement to reinstate him does so."[34] The Court agreed with the employer, "in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law."[35] But the Court reiterated that the public policy exception is narrow and must satisfy the principles explained in *W. R. Grace & Co.* and *Misco, Inc.*[36] And the Court reasoned that in the case before it, the employee's reinstatement was not contrary to public policy, because it was not unlawful despite a detailed statutory and regulatory scheme that represented a careful determination of public policy by the legislative and executive branches.[37]

[5] Although this court has not previously recognized the public policy exception to the enforcement of arbitration awards, the basic common-law contract principles upon which the Court relied in *Misco, Inc.*[38] are well established in Nebraska,[39] and other jurisdictions to have considered the

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[32] *Id.*

[33] *Eastern Associated Coal Corp., supra* note 19.

[34] *Id.*, 531 U.S. at 62-63.

[35] *Id.*, 531 U.S. at 63.

[36] See *W. R. Grace & Co., supra* note 13, and *Misco, Inc., supra* note 11.

[37] *Eastern Associated Coal Corp., supra* note 19.

[38] *Misco, Inc., supra* note 11.

[39] See, e.g., *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008); *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007); *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998); *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

question have taken an approach consistent with the U.S. Supreme Court's.[40] We agree with those jurisdictions and likewise hold that a court may refuse to enforce an arbitration award that is contrary to a public policy that is explicit, well defined, and dominant.[41] Such a public policy must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests, but the arbitration award need not itself violate positive law to be unenforceable as against public policy.[42]

With that established, we turn to a consideration of Henderson's relationship with the Ku Klux Klan and what it represents, and the Nebraska public policy concerns that relationship implicates.

Henderson's Affiliation With Ku Klux Klan

Henderson joined the Ku Klux Klan in 2004. In 2003, Henderson's wife had left him in favor of a Hispanic man, and an action for dissolution of marriage was filed. This led Henderson, in June 2004, to pay a $35 membership fee to join the Knights Party. Henderson admitted that the Knights Party is essentially the same entity as the Ku Klux Klan. A Knights Party application form, obtained by the State Patrol investigation, explained the Knights Party as follows:

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[40] See, e.g., *Westmoreland v. Westmoreland Intermediate*, 595 Pa. 648, 939 A.2d 855 (2007); *In re Merrimack County (NH PELRB)*, 156 N.H. 35, 930 A.2d 1202 (2007); *NJ Turnpike Auth. v. Local 196*, 190 N.J. 283, 920 A.2d 88 (2007); *Metro. Police Dept. v. Public Employee*, 901 A.2d 784 (D.C. 2006); *City of Boston v. Boston Police Patrolmen's*, 443 Mass. 813, 824 N.E.2d 855 (2005); *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234 (Tex. 2002); *Regional Transit Auth. v. Transit Union*, 91 Ohio St. 3d 108, 742 N.E.2d 630 (2001); *State Corr. Officers & Pol. Benev. v. State*, 94 N.Y.2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 (1999); *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941 (Utah 1996); *State Auditor v. Minn. Ass'n of Pro. Emp.*, 504 N.W.2d 751 (Minn. 1993); *Bureau of Maine State Police v. Pratt*, 568 A.2d 501 (Me. 1989); *AFSCME v. State of Illinois*, 124 Ill. 2d 246, 529 N.E.2d 534, 124 Ill. Dec. 553 (1988); *New Haven v. AFSCME, Council, Local 530*, 208 Conn. 411, 544 A.2d 186 (1988); *Amalgamated Transit Union v. MTA*, 305 Md. 380, 504 A.2d 1132 (1986).

[41] See *Eastern Associated Coal Corp.*, *supra* note 19.

[42] See *id.*

> The Knights Party is always looking for good men and women to associate with and work toward White Christian Revival.
>
> . . . The Knights' Party is not a secret society but rather a political movement, an alternative from the November Criminals of the Republican Party and Democrat Party.
>
> . . . .
>
> We are a political party building a strong foundation nation wide. We do not run candidates at this time so that all financial resources can be invested into the grass roots level - therefore we do not fall under the federal political party guidelines. Unlike the other political parties where they have to make public the names of contributors and associates. We do not. Your Klan association is kept strictly confidential.
>
> We are a Christian organization and in spite of what enemies of the Klan say or in spite of those who appear on talk shows who claim they are Klansmen and Klanswomen, we are nonviolent and won't allow such behavior. We are not opposed, however to self-defense only aggressive behavior.

On the application form, the applicant was asked to attest to the following:

> I am white and not of racially mixed descent. I am not married to a nonwhite. I do not date nonwhites no[r] do I have nonwhite dependents. I believe in the ideals of Western Christian civilization and profess my belief in Jesus Christ as the Son of God.
>
> I understand that The Knights Party is legal and law abiding and that I will never be asked to commit an unlawful act.
>
> . . . .
>
> I agree to follow the guidelines as set by headquarters to the best of my ability and to do what I am able to promote the interests of The Knights Party and its ultimate goal of political power and White Christian Revival.
>
> . . . .
>
> I understand I will be expected to be honest, ethical, sacrificing, dedicated, disciplined, and loyal.

And an attached letter from Knights Party National Director Thomas Robb, welcoming the applicant to the Knights Party, explained:

> The Knights prides itself on being the most professional and active pro-white movement in America and we also have Klansmen and Klanswomen throughout the world. Across the nation we are recognized as the most devoted and experienced movement in the struggle for White rights, White Pride and White Power! . . .
>
> . . . .
>
> Again, we welcome you as you start out on the journey to Knighthood. We pray that your decision to take this very important step was a decision based upon your desire to actively promote this most noble cause and not one of mere amusement. We take the problems that our people face very seriously and wish to **Knight** only the most dedicated and unselfish of individuals. We believe that you can be this type of person; a Klansman of purpose, a Klansman of dedication, a Klansman of sacrifice, a Klansman of humility, and a Klansman of loyalty. You joined the movement to make a difference. We trust you will not let our people, our faith, or our nation down. You have been given a great opportunity to make a real difference for our people. Let's make the most of it.
>
> White Victory!
>
> /s/
>
> Thomas Robb

(Emphasis in original.)

As a result of his application and payment of the fee, Henderson was issued a Knights Party membership card. The card read, in part:

> I pledge my loyalty. I will work for the preservation and protection of the White race. I understand Jesus Christ is our foundation and that we are not a secret army but men and women who proclaim the need of our people to put the true Christian faith in all areas of society, whether economic, judicial, social, educational, scientific, or political.

Henderson, under the user name "White knight in NE," posted messages in a Knights Party online discussion forum.[43] In a September 20, 2005, message, Henderson stated: "I'm the new guy from Nebraska. Just want to say hi. Hope everyone is doing good. Give me hints how this works. THANKS !!!!" And a few minutes later, Henderson posted the following:

> I have been in law enforcement 23 yrs. My fiancee has been working in TV news locally 8yrs. A recent hired black anchor ie: they need people of color on the news desk, has been trying to get real friendly with her. But she has told him to leave her alone. She even complained to the higher up's. They told her not to cause trouble. So, I contacted him, the black anchor and told him the same thing. leave her alone. I was very polite and kind about it. He complained to my Capt. that I was harrassing him. I was found not to be thru and investigation done by IA. But I was told to not contact him any more by my Capt. My fiancee went to an atty. that specialize's in these matters. She was told the black card wins all the time. So she probably should start looking for another job, or just not say anything to anyone at work.
>
> It is pretty bad when a person can not even complain about these things and they are told to stay away or not say anything. Over my 23 yrs in my job this sort of thing has been getting worse, not only at work, but also with suspects. Whites are losing there rights slowly. It's sad. I pray about it. I hope my prayers get answered. White knight in Ne.

Later that day, Henderson posted again: "Can someone put me in touch with others in the omaha, ne area that have the same beliefs that I do. God Country and Race. Your White Knight in Ne." After a response from another member suggested that Henderson contact "Headquarters," Henderson replied: "Thank you for your reply. I will contact them ie: HQ.

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[43] Because of the informal style of these messages, there are various grammar, spelling, and syntax errors. Indicating each error with a "[sic]" would be distracting, so we reproduce each of the messages in its original form.

I just feel like I'm fighting a up hill battle by myself here in NE. God bless. Your White Knight in Ne." A few days later, Henderson posted:

> I guess I was stupid when I asked to be put in touch with other members in Nebraska. I know evryone must be discreet. I especially need to be discreet because of my job ie: law enforcement. But if anyone wants to contact me, being discreet. You can contact me by e-mail [e-mail address redacted] or phone [telephone number redacted]. I'm in Omaha. If no one contacts me because or privacy I fully understand. Your White Knight in Ne.
>
> P.S. I especially would like to know other law enforcement people. As we would have alot in common.

Henderson reported that no one responded to his request for contact, and there is no evidence of any further participation by Henderson in Knights Party discussion or activities. Henderson resigned his membership in the Knights Party in an e-mail sent February 20, 2006—after the State Patrol investigation had commenced, after the State Patrol investigator had concluded that the allegations against Henderson were well founded, and the day before the internal affairs conduct and procedures meeting that resulted in a recommendation that Henderson's employment be terminated.

Ku Klux Klan

The Ku Klux Klan was founded in Pulaski, Tennessee, in 1865 or 1866, by former officers of the Confederacy.[44] It began as a social fraternity of pranksters, but was quickly transformed into a terrorist organization aimed to promote and preserve white supremacy.[45] In the post-Civil War South, under the leadership of a former Confederate general, Nathan Bedford Forrest, the Ku Klux Klan became a counterrevolutionary organization that "whipped, shot, hanged, robbed, raped, and

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[44] See *Church of the Ku Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004). See, also, Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (1971).

[45] See, *Kerik*, *supra* note 44; Trelease, *supra* note 44.

otherwise outraged Negroes and Republicans across the South in the name of preserving white civilization."[46] The movement was from the start, and still is, highly decentralized, but "[t]he overriding purpose of the Ku Klux movement, no matter how decentralized, was the maintenance or restoration of white supremacy in every walk of life."[47]

The Ku Klux Klan was officially "disbanded" by Forrest when even he proved unable to control it, but local units continued to operate until sent into hiding by federal troops[48] empowered by federal legislation specifically enacted to combat the Ku Klux Klan.[49] It reorganized in 1915 and was extraordinarily successful due to a nascent civil rights movement, urbanization, northern migration of blacks, and immigration.[50] The movement fragmented again after the Second World War but gained new strength in the wake of *Brown v. Board of Education*[51] and in opposing the growing civil rights movement.[52] Between 1955 and 1965, the Ku Klux Klan or Ku Klux Klan sympathizers perpetrated more than 200 bombings and murdered 40 civil rights workers.[53] Although the Ku Klux Klan's threat has waned since, it has recently begun to regain strength by advancing an anti-immigrant message, much as it did during its heyday in the 1920's, when its meteoric

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[46] Trelease, *supra* note 44 at xi. See, also, *Kerik*, *supra* note 44.

[47] Trelease, *supra* note 44 at xlvi.

[48] Anti-Defamation League, Ku Klux Klan - History, http://www.adl.org/learn/ext_us/kkk/history.asp (last visited Feb. 26, 2009).

[49] See, generally, *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

[50] See *id.*

[51] *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

[52] See, generally, *Black*, *supra* note 49; John George & Laird M. Wilcox, Nazis, Communists, Klansmen, and Others on the Fringe: Political Extremism in America (1992), citing George Thayer, The Farther Shores of Politics (1967).

[53] *KKK: Inside American Terror* (National Geographic Channel television broadcast Oct. 15, 2008).

rise was fueled by fear of Catholic European immigrants.[54] Over its long history, the Ku Klux Klan has always managed to rebuild.[55]

Nebraska has not been immune to the Ku Klux Klan's influence. The Ku Klux Klan began actively recruiting members in Nebraska in 1921.[56] Soon, the Ku Klux Klan claimed 45,000 members in Nebraska, and public demonstrations, parades, and cross burnings grew common.[57] The Ku Klux Klan was vigorous in its campaigns against blacks, Jews, foreigners, Catholics, and women suffragists.[58] Early resistance from key political officials and newspapers, however, blunted the Ku Klux Klan's appeal in Nebraska, and "although it would linger in a number of communities well into the 1930s, [it] soon faded from the public scene."[59] But not before it divided communities with anger and hostility and engendered fear of violence among those that it targeted for exclusion.[60]

The Ku Klux Klan's history and notoriety give it, and its symbols, influence and meaning greatly disproportionate to its remaining membership. The Ku Klux Klan has been characterized as "'"[t]he world's oldest, most persistent terrorist organization."'"[61] There is little doubt that the Ku Klux Klan's main objective remains to establish a racist white government in the

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[54] See *id.*

[55] *Id*.

[56] Michael W. Schuyler, *The Ku Klux Klan in Nebraska, 1920-1930*, 66 Nebraska History 234 (1985).

[57] *Id*.

[58] Kathryn Watterson, Not By The Sword: How the Love of a Cantor and His Family Transformed a Klansman (1995). See, also, Schuyler, *supra* note 56; Patricia A. Welker, *The Church in Two Diverse Communities During the 1920s: Guthrie Center, Iowa, Sidney, Nebraska, and a Pragmatic Minister*, 44 Journal of the West 62 (2005).

[59] Schuyler, *supra* note 56 at 252.

[60] See, Schuyler, *supra* note 56; Welker, *supra* note 58.

[61] See *Black*, *supra* note 49, 538 U.S. at 388 (Thomas, J., dissenting), quoting M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia (1991). See, also, *KKK: Inside American Terror, supra* note 53.

United States.[62] The Ku Klux Klan, like the burning cross that is its most dramatic and visible sign, is a symbol of organized violence, physical as well as verbal, directed against blacks.[63] "[N]o single group more starkly demonstrates the endurance of dark social forces in the United States—racism, religious bigotry, extralegal vigilantism, moral authoritarianism—than the Klan, a hooded secret order now well into its second century of existence."[64]

Nor is there any doubt that the Knights Party is heir to the historical Ku Klux Klan. The Knights Party attempts to make itself respectable by presenting itself as representing Christian family values, and this approach has made it one of the largest traditional Ku Klux Klan groups operating today.[65] But the record establishes that the Knights Party, while it purports to discourage violence, expressly claims to be the Ku Klux Klan founded in Pulaski over 140 years ago and the Ku Klux Klan that marched in Washington, D.C., in the 1920's. The Knights Party invokes and claims the legacy of Nathan Bedford Forrest. The Knights Party uses the ceremonial robes and Celtic cross that have traditionally represented the Ku Klux Klan.[66] And the Knights Party invokes the same political views, declaring, "God gave the entire earth to be the white man and woman's domain. That is our purpose in being here; to subdue and rule. Under our Christian guidance, all races will lead a much happier existence. Law and order is what they need."

The Knights Party claims to be nonviolent, and there is no evidence in the record that it is not. But it is also worth noting that while the Knights Party officially disclaims violence, distance from violence is a tactic that traditional Ku Klux Klan

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[62] See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (Thomas, J., concurring).

[63] *Church of Amer., Ku Klux Klan v. City of Gary, IN*, 334 F.3d 676 (7th Cir. 2003).

[64] Shawn Lay, ed., The Invisible Empire in the West: Toward a New Historical Appraisal of the Ku Klux Klan of the 1920s at 1 (1992).

[65] *KKK: Inside American Terror, supra* note 53.

[66] See *Church of American Knights Ku Klux v. City of Erie*, 99 F. Supp. 2d 583 (W.D. Pa. 2000).

groups have used in the past.[67] It has been historically common for the Ku Klux Klan to publicly deny that its movement has engaged in illegal activity, or even that it is racist or anti-Semitic.[68] Among the first prescripts of the Ku Klux Klan, dating to 1868, is a "formal statement of character and purpose" that proclaims the Ku Klux Klan to be "'an institution of Chivalry, Humanity, Mercy, and Patriotism'" intended "'to protect the weak, the innocent, and the defenceless, from the indignities, wrongs, and outrages of the lawless, the violent, and the brutal'" and to support the U.S. Constitution and constitutional laws.[69] But despite that rhetoric, not dissimilar to that advanced by the Knights Party today,

> [i]t would be hard to imagine a greater parody than this on the Ku Klux Klan as it actually operated. It frequently pandered to men's lowest instincts; it bullied or brutalized the poor, the weak, and the defenseless; it was often the embodiment of lawlessness and outrage; . . . and it set at defiance the Constitution and laws of the United States.[70]

The Ku Klux Klan's public statements disavowing lawlessness have often been self-serving attempts to avoid prosecution for acts of violence.[71] But beyond that, even when technically true, they are not entirely compelling, given the nature of Ku Klux Klan ideology. As one historian has observed, the Ku Klux Klan provides "cultural sanction" for violence

> from each of the strands in the Klan's world view: its reactionary populism, its racialism, its gender conventions, and its overall alarm about the state of society and government. Together, they worked to prompt and ennoble white male violence undertaken in defense of family and community. To put it another way, there were no significant restraining elements in Klan culture that might act

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[67] *KKK: Inside American Terror*, *supra* note 53.

[68] See Nancy MacLean, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan (1994). See, also, George & Wilcox, *supra* note 52.

[69] Trelease, *supra* note 44 at 16-17.

[70] *Id.* at 17.

[71] See MacLean, *supra* note 68.

> to inhibit violence against outsiders to Klansmen's idea of community.[72]

Stated another way, the Knights Party's attempt to disclaim violence is insufficient to excuse its continued endorsement of a historical legacy of violence, and the inevitably violent consequences of its hateful political and social propaganda. Given the history of the Ku Klux Klan, and the Knights Party's express claim to that history, we have little difficulty in concluding that for all practical purposes, joining the Knights Party is the same as joining the historical Ku Klux Klan. Nor is it difficult to conclude that the historical Ku Klux Klan represents discrimination, violence, and armed resistance to lawful authority.

Nebraska Public Policy

The State of Nebraska was founded only a year or two after the Ku Klux Klan. Nebraska entered the Union on March 1, 1867, upon the "fundamental condition," imposed by Congress as a requirement for Nebraska's statehood, that "there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color."[73] Among the first official acts of the newly assembled Nebraska Legislature was to transmit to the President of the United States its authenticated assent to that condition, so that the President could proclaim Nebraska's admission to the Union.[74] The principle that laws should be enforced without regard to race is, in this sense, not only a fundamental public policy of the State of Nebraska—it is *the most* fundamental public policy of the State, as the condition upon which Nebraska's admission to the Union depended.

That "fundamental condition," as an expression of public policy, is reflected throughout Nebraska law. The Nebraska Constitution provides that "[n]o person shall be . . . denied equal protection of the laws"[75] and, as recently amended, also

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[72] *Id.* at 150.

[73] See Gen. Stat. ch. 1 (1873).

[74] See *id.*

[75] Neb. Const. art. I, § 3.

provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[76] And since 1867, this state's motto, expressed on the Great Seal of the State of Nebraska, has been "Equality Before the Law."[77]

More recent enactments reflect the same principles. Nebraska law expressly prohibits discrimination on the basis of race or religion in a variety of contexts, including public accommodations,[78] housing,[79] employment,[80] insurance,[81] borrowing and lending,[82] collective bargaining,[83] military procurement,[84] libraries,[85] and National Guard service.[86] The Legislature has also authorized cities and villages to enact their own antidiscrimination provisions.[87] Nebraska law expressly provides that "[a] person in the State of Nebraska has the right to live free from violence, or intimidation by threat of violence . . . regardless of his or her race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability"[88] and imposes enhanced criminal penalties upon those who violate those rights.[89]

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[76] *Id.*, § 30(1).

[77] See Neb. Rev. Stat. § 84-501 (Reissue 2008).

[78] See Neb. Rev. Stat. §§ 20-132, 20-134, and 20-139 (Reissue 2007).

[79] See Neb. Rev. Stat. §§ 20-318 (Reissue 2007) and 76-1495 (Reissue 2003).

[80] See Neb. Rev. Stat. §§ 23-2531 (Reissue 2007), 48-1101 et seq. (Reissue 2004), and 81-1355 (Reissue 2008).

[81] See Neb. Rev. Stat. § 44-7510 (Reissue 2004).

[82] See Neb. Rev. Stat. § 45-1056 (Reissue 2004).

[83] See Neb. Rev. Stat. § 48-214 (Reissue 2004).

[84] See Neb. Rev. Stat. § 48-215 (Reissue 2004).

[85] See Neb. Rev. Stat. § 51-211 (Reissue 2004).

[86] See Neb. Rev. Stat. § 55-134 (Reissue 2004).

[87] See Neb. Rev. Stat. §§ 18-1724 and 20-113 (Reissue 2007).

[88] Neb. Rev. Stat. § 28-110 (Reissue 2008).

[89] See Neb. Rev. Stat. § 28-111 (Reissue 2008).

It is the clearly established public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens. It is for that reason that this court, pursuant to the administrative authority conferred upon it by the Nebraska Constitution,[90] has promulgated a Code of Judicial Conduct providing that a judge shall perform judicial duties without bias or prejudice.[91] Because *the appearance* of bias or prejudice is detrimental to the administration of justice, the code also provides that

> [a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.[92]

And because membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired, a judge "shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."[93]

But the most direct expression of the importance of ensuring *that citizens perceive* law enforcement to be free of discrimination is Nebraska's racial profiling act.[94] The act explains, "Racial profiling is a practice that presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated."[95] The act prohibits police, expressly including a member of the State Patrol, from engaging in racial profiling[96] and requires law enforcement agencies,

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[90] See Neb. Const. art. V, § 1.

[91] See Neb. Code of Judicial Conduct § 5-203(B)(5).

[92] See *id.*

[93] See Neb. Code of Judicial Conduct § 5-202(C).

[94] See Neb. Rev. Stat. § 20-501 et seq. (Reissue 2007).

[95] § 20-501.

[96] § 20-502.

including the State Patrol, to adopt a written policy prohibiting the practice.[97] And it imposes requirements intended to measure and prevent the practice of racial profiling.[98]

The act is particularly pertinent because of the determination of public policy that led to its enactment. As the senator introducing the measure to the Legislature explained, "[t]he problem is that regardless of whether there is racial profiling in Nebraska or not, there is the perception of unfairness."[99] The executive director of the Nebraska Equal Opportunity Commission, testifying in support of the legislation, agreed that "we must admit that there is a perception, and I use the word perception loosely because actually, it's more than a perception, that some officers are engaging in racial profiling, and this has created resentment and distrust of the police, particularly in communities of color."[100] And the chairperson of the Judiciary Committee explained that "[t]he people of Nebraska greatly appreciate the hard work and dedication of law enforcement officers in protecting the public" and that "[t]he good name of these officers should not be tarnished by the actions of those few who commit discriminatory practices."[101] As the introducing senator explained,

> Nebraska has always been a diverse state with an immigrant background. Our heritage and disposition has been that of being inclusive and accepting [in] nature. This is one of the greatest traits of our state. That's why I believe it's important to present an open, fair law enforcement image for our state. . . . The problem that we have, regardless of whether there's racial profiling existing in Nebraska or not, [is that] we have the perception of unfairness. Because of that perception, many people who are stopped for a legitimate reason may think that they're

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[97] § 20-504.

[98] See § 20-501 et seq.

[99] Floor Debate, L.B. 593, 97th Leg., 1st Sess. 7954 (May 22, 2001).

[100] Judiciary Committee Hearing, L.B. 593, 97th Leg., 1st Sess. 13 (Mar. 7, 2001).

[101] Floor Debate, *supra* note 99 at 7955.

> being stopped [or] targeted due to their race. We need to collect data to determine whether the racial profiling does exist in our state, and to remove the perception of unfairness that we have.[102]

[6,7] Taken as a whole, this authority evidences an explicit, well-defined, and dominant public policy of the State of Nebraska that is as old as the State itself: that the laws of Nebraska should be enforced without racial or religious discrimination. But more importantly, this public policy incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination. And the Legislature's determination in that regard makes sense. Under our system of government, the duty of law enforcement can be performed effectively only with the consent of the vast majority of those citizens policed. Efficient law enforcement requires mutual respect, trust, and support.[103] As the Supreme Judicial Court of Massachusetts has persuasively explained,

> "One of the most important police functions is to create and maintain a feeling of security in communities. To that end, it is extremely important for the police to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials." . . . "The image presented by police personnel to the general public . . . 'also permeates other aspects of the criminal justice system and impacts its overall success.'"[104]

We agree, and we hold that Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race. We emphasize that this public policy is only implicated by behavior of the gravest nature. But we find that Henderson's

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[102] Judiciary Committee Hearing, *supra* note 100 at 2.

[103] *McMullen, supra* note 14. See, also, *Weicherding, supra* note 14.

[104] *City of Boston, supra* note 40, 443 Mass. at 819-20, 824 N.E.2d at 861 (citation omitted).

knowing and willing affiliation with the Ku Klux Klan is such behavior.

Henderson's Reinstatement Violates Nebraska Public Policy

The State Patrol argues that the arbitration award violates public policy because it requires the State Patrol "to employ as a law enforcement officer an individual who has voluntarily associated himself with the [Ku Klux Klan] and the principles it espouses—arguably the most reviled, feared, violent, and racist organization in this country's history."[105] The State Patrol concludes that requiring Henderson's reinstatement "ignores the reality that a law enforcement officer who embraces a creed of racial bias and racial superiority breeds distrust, fear, and apprehension among members of the public [and] raises concerns among the public that his employer and fellow officers may harbor similar beliefs."[106] We agree.

Given the Ku Klux Klan's history, any choice to join that organization is a choice to associate with a symbol of violence and terrorism. We also note that Henderson's membership in the Knights Party is consistent with a long-established Ku Klux Klan strategy of recruiting and publicizing the membership of law enforcement officers. The Ku Klux Klan has historically enrolled or enlisted the support of law enforcement officers, to stave off indictment when victims of violence, "having recognized law enforcement officials among their assailants, understandably believed prosecution futile."[107] Consistent with that strategy, Henderson's continued service as a sworn employee of the State Patrol would directly advance the interests of the Ku Klux Klan by fostering the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others.

We recognize that Henderson was not an overly active member of the Ku Klux Klan. But this was not a case of, as Henderson contended at oral argument, merely "getting on the

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[105] Brief for appellees at 30.

[106] *Id.* at 38.

[107] MacLean, *supra* note 68 at 170.

wrong web site at the wrong time." It is beyond dispute that he willingly joined the Knights Party, knowing that he was effectively joining the Ku Klux Klan. In joining, he endorsed a point of view that is completely antithetical to the principles of Nebraska law that he was bound by oath to enforce. He provided direct financial support for the Ku Klux Klan's racist activities. And his membership has provided the Ku Klux Klan with valuable publicity and propaganda.

The fact is that Henderson chose to associate himself with the Ku Klux Klan and everything that the Ku Klux Klan represents—a legacy of hatred, bigotry, violence, and terror that is utterly inconsistent with the responsibilities of a member of the Nebraska State Patrol. One cannot simultaneously wear the badge of the Nebraska State Patrol and the robe of a Klansman without degrading what that badge represents when worn by *any officer*.

Although arbitration decisions are given great deference, they are not sacrosanct.[108] Here we cannot say that the strong public policy favoring arbitration should trump the explicit, well-defined, and dominant public policy that laws should be enforced without racial or religious discrimination, and the public should reasonably perceive this to be so. Having associated himself with the Ku Klux Klan, Henderson's return to duty would involuntarily associate the State Patrol with the Ku Klux Klan and severely undermine public confidence in the fairness of law enforcement and the law itself. Therefore, we conclude that the arbitrator's decision reinstating Henderson to the Nebraska State Patrol violates Nebraska public policy and that the district court correctly refused to enforce the award. Henderson and SLEBC's assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

WRIGHT, J., not participating in the decision.

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[108] *City of Boston, supra* note 40.

STEPHAN, J., dissenting.

To most people, it would seem patently obvious that the termination of Robert Henderson's employment with the Nebraska State Patrol was justified because his membership in the Knights Party, an affiliate of the Ku Klux Klan, reflects negatively on the State Patrol and could impair its operations or efficiency. But that is not what the arbitrator concluded. While I share the majority's doubt that the arbitrator decided this case correctly, I respectfully disagree with its conclusion that the narrow public policy exception to binding arbitration bars judicial enforcement of the award.

As the majority acknowledges, judicial review of an arbitration award is severely circumscribed.[1] We have noted:

> Appellate review of an arbitrator's award is necessarily limited because "to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." . . . "[S]trong deference [is] due an arbitrative tribunal." . . . Furthermore, "'[w]hen . . . parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process.'"[2]

Arbitration is not a judicial proceeding; it is purely a matter of contract.[3] Because parties to a collective bargaining agreement have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."[4] "[I]mprovident, even

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[1] See *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001).

[2] *Id.* at 798, 635 N.W.2d at 271 (citations omitted).

[3] See, *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002); *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[4] *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987).

silly," factfinding by an arbitrator does not permit a court to set aside an award.[5]

In this case, the arbitrator found that Henderson was fired not "because of his actions on the job," but, rather, "because of his beliefs and because he sought out others who shared his beliefs." The arbitrator determined that "the antagonism [Henderson] seems to feel towards non-white racial groups has never reared its ugly head on the job" and that the State Patrol "was not able to point to a single instance on the job" where Henderson's actions "exhibited any hatred, anger, disgust, or discrimination towards any minority group." The arbitrator found, based on the State Patrol's own data, that Henderson conducted traffic stops "in a race-neutral manner." The arbitrator found that while Henderson

> may have personal philosophies that would disgust many citizens of Nebraska, nevertheless, he has well-hidden those beliefs and they have not interfered with his impartial enforcement of the law. The Arbitrator has been persuaded that, to just about anyone he knows or interacts with professionally, [Henderson] projects himself as "an example of stability, fidelity and morality." Furthermore, there is no evidence or credible testimony that [Henderson's] affiliation with the Knight's Party/KKK impaired "the operation or efficiency of the State Patrol or the employee" or that his reinstatement will likely impair "the operation or efficiency of the State patrol or the employee."

Based upon the record made during a 12-hour hearing, the arbitrator concluded that "the State Patrol violated the Constitution, the Contract, and its own policies and procedures" when it discharged Henderson. In a finding particularly relevant to the issue before this court, the arbitrator stated:

> It is very likely that, under [several] decisions of the United States Supreme Court, the State Patrol could have successfully defended the constitutionality of its decision to terminate [Henderson] by either showing some actual harm to its ability to maintain discipline and

[5] *Id.*, 484 U.S. at 39.

> good order within the ranks, or by showing some actual diminution in the State Patrol's ability to perform its police function.
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> That said, the State Patrol bore the burden of showing such disruptions, and the Patrol failed to meet this burden. In the final analysis, all that the Agency presented to the Arbitrator was surmise and speculation that some operational or community-relations harm could occur; this was precious little upon which to hang the "hat" of deciding to terminate [Henderson].

The arbitrator also found that the State Patrol failed to show "any minimally-persuasive evidence that [Henderson's] actions or beliefs would cause disruptions in [Henderson's] ability to effectively work with the Patrol's black Troopers, or that [Henderson's] actions or beliefs would cause the Patrol difficulties with respect to the morale, efficiency, or good order of the State Patrol."

As much as we may disagree with these findings, we are bound by them under well-established principles of arbitration law. I agree with the majority that in deciding whether the arbitrator's award should be enforced, our focus is solely on the remedy, which in this case is an order of reinstatement. To paraphrase *Eastern Associated Coal Corp. v. Mine Workers*,[6] the issue presented is not whether Henderson's conduct violated public policy, but whether the enforcement of the arbitration award requiring his reinstatement would do so.

The majority correctly states that it is the "public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens." But in light of the arbitrator's factual findings, Henderson's reinstatement would not, in and of itself, automatically result in racial profiling or some other form of discriminatory law enforcement. The mere fact of Henderson's reinstatement, without more, would not violate any constitutional or statutory provision making racial discrimination unlawful. Only some unlawful conduct committed by Henderson *after* reinstatement could violate

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[6] *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000).

such laws and the public policy upon which they are based. And it cannot be said on this record that such conduct is even likely, given the arbitrator's finding that despite his personal beliefs, Henderson has never breached his duty to enforce the law fairly and impartially in the past. With respect to his future conduct, Henderson would be bound by his oath to enforce the law fairly and in a nondiscriminatory manner, and he would be subject to the same civil and criminal liabilities as any other public officer if he failed to do so.[7]

The majority reasons that the public policy of nondiscriminatory law enforcement "incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination." It then accepts the State Patrol's argument that a law enforcement officer with Henderson's affiliations "'breeds distrust, fear, and apprehension among members of the public [and] raises concerns among the public that his employer and fellow officers may harbor similar beliefs.'" Were we deciding this issue in the first instance, I would agree. But our review requires that we give deference to the findings of the arbitrator, and the conclusion reached by the majority necessarily rejects the arbitrator's specific finding that Henderson's past affiliation had not and would not impair the mission of the State Patrol. By defining public policy so broadly as to incorporate public perception of possible future harm, the majority has simply upheld the State Patrol's initial determination that Henderson's affiliation with the Knights Party reflected negatively on the State Patrol and brought the Patrol into disrepute. While this may seem perfectly logical, it necessarily repudiates the arbitrator's findings that Henderson's personal affiliations and beliefs, however reprehensible, have not affected his ability or that of the State Patrol to fairly and impartially enforce the law.

Reasoning similar to that of the majority in this case was explicitly rejected by the Supreme Court in *Paperworkers v. Misco, Inc.*[8] That case involved a machine operator who

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[7] See, 18 U.S.C. § 242 (2006); 42 U.S.C § 1983 (2000); Neb. Rev. Stat. § 20-148 (Reissue 2007).

[8] *Paperworkers v. Misco, Inc.*, *supra* note 4.

was apprehended in the back seat of a car that was parked on the employer's premises. There was marijuana smoke in the vehicle and a lighted marijuana cigarette in the front seat ashtray. The employee did not own the car. The employee was discharged for violating rules prohibiting the possession of drugs on company premises, and the matter was submitted to arbitration. The arbitrator determined that there was no proof that the employee had actually possessed marijuana on company property and, thus, that there was no just cause for the discharge. The arbitrator ruled the employee was entitled to reinstatement with full seniority and backpay. A federal district court refused to enforce the award on public policy grounds, and an appeals court affirmed, concluding that reinstatement would violate the public policy against operation of dangerous machinery by persons under the influence of drugs or alcohol. The Supreme Court determined that while this judgment was "firmly rooted in common sense," it did not justify refusal to enforce the award.[9] The Court held that the appeals court had improperly drawn inferences from the facts, and it stressed that whether the employee "had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding" which was the arbitrator's function, not the appellate court's.[10] The Supreme Court made it very clear that even an inquiry into a "possible violation of public policy" does not "excuse a court for doing the arbitrator's task,"[11] noting:

> Had the arbitrator found that [the employee] had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that [the employee] could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.[12]

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[9] *Id.*, 484 U.S. at 44.

[10] *Id.*, 484 U.S. at 44-45.

[11] *Id.*, 484 U.S. at 45.

[12] *Id.*

With respect to Henderson, the majority here is doing precisely what the Supreme Court prohibited.

The arbitrator's findings in this case are similar to those considered by a New York appellate court in *State Corr. Officers & Pol. Benev. v. State.*[13] There, a correctional officer was suspended from duty for flying a Nazi flag from the front porch of his home on the 55th anniversary of Adolph Hitler's declaration of war on the United States. Several newspapers throughout the state reported the event. The department of correctional services charged the officer with violating rules prohibiting off-duty conduct which would "'reflect discredit upon the Department or its personnel'" and prohibiting an officer from affiliating with groups having interests which would "'interfere with the impartial and effective performance'" of the officer's duties.[14] The suspension was submitted to arbitration, and the arbitrator found no nexus between the officer's off-duty misconduct and his employment, noting the absence of "evidence that his conduct harmed the Department's business, adversely affected [the officer's] ability to perform his job, or caused co-workers not to work with him."[15] The arbitrator concluded that the projection of possible harm, as opposed to actual harm, was not sufficient to permit restriction of the officer's symbolic free speech or regulation of his off-duty conduct.

The court rejected the department's request that the arbitration award be vacated on public policy grounds. It noted that it was bound by the arbitrator's decision unless it could determine that the award violated public policy in the form of a "well-defined constitutional, statutory or common law of this State."[16] It concluded that because neither state statutes, regulations, nor the employee manual "proscribes the reinstatement of an employee who engaged in conduct as established here but who nevertheless is found *not guilty* of the charges as

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[13] *State Corr. Officers & Pol. Benev. v. State*, 94 N.Y.2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 (1999).

[14] *Id.* at 324-25, 726 N.E.2d at 464, 704 N.Y.S.2d at 912.

[15] *Id.* at 325, 726 N.E.2d at 465, 704 N.Y.S.2d at 913.

[16] *Id.* at 328, 726 N.E.2d at 467, 704 N.Y.S.2d at 915.

submitted to the arbitrator,"[17] it could not vacate the award as violative of public policy. The court noted that "[a]s abhorrent as [the officer's] personal conduct is, Judges cannot reject the factual findings of an arbitrator simply because they do not agree with them."[18] The court also rejected the department's request that it apply a balancing test to determine that the officer's right to freedom of expression was outweighed by the governmental interest in the safe and efficient operation of the correctional facility, concluding

> [t]o do so . . . would require us to invade the province of the arbitrator under the guise of public policy, and to reexamine and redetermine the merits of the case. By submitting the issue of [the officer's] conduct to arbitration, the parties placed upon the arbitrator the responsibility of passing on the implications of [his] offensive conduct under the collective bargaining agreement. We must honor the choice of the parties to have their controversy decided in that forum.[19]

In my view, the majority has rejected the findings of the arbitrator and redecided the merits of this case under the guise of public policy. I could accept the reasoning of the majority that Henderson's reinstatement would foster "the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others" if the arbitrator had made any findings that Henderson's affiliation with the Knights Party affected the performance of his duties, because in that circumstance there would be a factual basis upon which to conclude that Henderson could not be trusted with the duties and responsibilities of law enforcement.[20] But the arbitrator actually made specific affirmative findings that Henderson's beliefs "have not interfered with his impartial enforcement of the law," and it is therefore entirely speculative to conclude that the public would have a contrary perception if he were reinstated.

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] See *City of Boston v. Boston Police Patrolmen's*, 443 Mass. 813, 824 N.E.2d 855 (2005).

In concluding that Henderson's reinstatement would violate public policy by creating a public perception of discriminatory law enforcement, the majority disregards the following provision of the award specifically designed to prevent or mitigate any such perception:

> Nothing in this Award shall prevent the Nebraska State Patrol from reassigning [Henderson] in the future, if necessary to maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware of [Henderson's] association with the Knight's [sic] Party, Christian Concepts, the Ku Klux Klan, or any other such group[.]

Henderson's counsel acknowledged at oral argument that if the award were enforced and Henderson were reinstated, the State Patrol "could assign him to the supply division. They could [assign] him to communications. They could have him cleaning out desks for the next three or four years if they wished to do that." Other courts, including the Supreme Court, have considered the flexibility of an arbitral award of reinstatement in considering whether it violated public policy. In *Misco, Inc.*,[21] where the machine operator charged with marijuana use was ordered reinstated to his old position or an equivalent one for which he was qualified, the Supreme Court noted that the employer had not established that he "would pose a serious threat to the asserted public policy in every job for which he was qualified."[22] Similarly, the Eighth Circuit Court of Appeals held that an arbitration award requiring reinstatement of an employee who had breached safety regulations at a liquid natural gas storage facility did not violate public policy where it permitted reassignment to a different, less-sensitive position in which safety concerns were not implicated.[23]

Finally, I am concerned that the majority understates the significance of the arbitrator's finding that Henderson's

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[21] *Paperworkers v. Misco, Inc.*, *supra* note 4.

[22] *Id.*, 484 U.S. at 45.

[23] *Midamerican Energy v. Intern. Broth. of Elec.*, 345 F.3d 616 (8th Cir. 2003).

discharge violated his First Amendment rights. Again, while we may disagree strongly with this finding, we are bound by it in the procedural posture of this case. That being so, the result reached by the majority necessarily implies that it is willing to ignore the State's violation of Henderson's constitutional rights because if he were reinstated, the public may *perceive* that he may violate someone else's rights in the future, despite the arbitrator's specific findings that he has never done so in the past. In my view, this apparent subordination of individual constitutional rights to the "greater good" poses a far greater risk of harm to the public policy of this state than reinstating one misguided trooper and reassigning him to some mundane position well behind the front lines of law enforcement, where he would pose no actual or reasonably perceivable threat to the mission of the State Patrol or the welfare of the public it serves.

In summary, while I disagree with many of the arbitrator's factual findings and legal conclusions and share the majority's revulsion toward Henderson's affiliation with the Knights Party and everything that organization stands for, I cannot conclude that the award of reinstatement would violate public policy under the restrictive standard prescribed by the U.S. Supreme Court in *W. R. Grace & Co. v. Rubber Workers*[24]; *Misco, Inc.*[25]; and *Eastern Associated Coal Corp.*[26] I therefore respectfully dissent.

CONNOLLY, J., joins in this dissent.

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[24] *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983).

[25] *Paperworkers v. Misco, Inc.*, *supra* note 4.

[26] *Eastern Associated Coal Corp. v. Mine Workers*, *supra* note 6.

DON J. INCONTRO, APPELLEE, V. LIANE JACOBS, APPELLANT.

761 N.W.2d 551

Filed February 27, 2009. No. S-07-991.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Support.** Child support orders are always subject to review and modification.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
5. **Modification of Decree: Child Support.** A decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, but only those anticipated changes which were specifically noted on the record at the time the previous order was entered will prevent modification.
6. ____: ____. A proceeding to modify a child support order is neither a retrial of the original case nor a review of the original decree.
7. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
8. **Modification of Decree: Child Support: Proof.** The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
9. **Modification of Decree: Child Support: Alimony: Good Cause.** Material change in circumstances in reference to modification of child support is analogous to modification of alimony for good cause.
10. **Modification of Decree: Child Support.** Courts may consider various factors to determine whether a material change of circumstances has occurred. Among the factors to be considered are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of the obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent.
11. ____: ____. The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.

12. **Rules of the Supreme Court: Child Support.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
13. ____: ____. If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities.
14. ____: ____. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources.
15. **Modification of Decree: Child Support.** Earning capacity is another factor used to determine whether a material change in circumstances has occurred warranting modification.
16. **Child Support.** If it is shown that a reduction in the obligor parent's income is attributable to his or her personal wishes and not the result of unfavorable or adverse conditions in the economy, his or her health, or other circumstances affecting his or her earning capacity, then a reduction in child support is not warranted.

Petition for further review from the Court of Appeals, SIEVERS, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, GREGORY M. SCHATZ, Judge. Judgment of Court of Appeals affirmed.

Karen A. Bates-Crouch and Christen Carns, Senior Certified Law Student, of Bates-Crouch Law Office, P.C., L.L.O., and Eric M. Rees, of Blinn, Rees & Loveland, P.C., L.L.O., for appellant.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly & Sodoro, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Don J. Incontro filed a second application to modify child support after previously seeking a modification of child custody. The district court modified Incontro's child support obligation, and the mother, Liane Jacobs, appealed. The Nebraska Court of Appeals reversed, concluding that Incontro failed to show there had been a material change of circumstances in his income that was not contemplated at the time the first modification order was entered. We granted Incontro's petition for further review.

BACKGROUND

On September 17, 2004, the court entered a decree establishing the paternity and custody of two minor children. The parents of the two minor children are Incontro and Jacobs. The court granted custody to Jacobs. Incontro was granted reasonable and liberal parenting time, and he was ordered to pay child support in the amount of $804.82.

For purposes of determining child support, the district court listed Incontro's gross monthly income as $3,145.92, which represented a 57.82 percent contribution to the parties' monthly income. Both parties were ordered to provide health insurance for the children as available through their respective employers. The court ordered Incontro to pay "57.83%" of unreimbursed medical and daycare expenses. The court also granted Incontro the right of first refusal to care for the children whenever Jacobs had to work. This right was later vacated by the court at Jacobs' request.

The record does not reveal any information on how the district court calculated Incontro's gross monthly income. The record shows that Incontro is 50 years old with a license in cosmetology. Incontro testified that he is a self-employed cosmetologist at Hair Technology, Inc. (Hair Tech), a beauty salon. Other evidence in the record reveals that Incontro served as a manager at Hair Tech at some point. In 2004, Incontro and Kelli Renner were the sole owners of Hair Tech—owning 5,000 shares of stock each. In late 2004, Incontro allegedly gave his shares of stock to Renner as a gift.

Shortly after the paternity decree was entered, Incontro filed an application to modify the paternity decree. The application was not included in the appellate record. Incontro testified that he filed his first application for modification on November 22, 2004. His attorney explained that, at that time, Incontro was seeking custody of the children and, as part of that, sought child support from Jacobs. The court took judicial notice of the application, which was in the court file. The court read into the record that Incontro's application stated: "[I]t's in the best interest of the children that they be placed with [Incontro]." The court also noted that Incontro asked for child support and attorney fees.

The court entered the first modification order on June 5, 2006, increasing Incontro's visitation rights and modifying the delegation of daycare expenses and unreimbursed medical expenses. With regard to medical expenses, the court ordered Jacobs to pay the first $480 of unreimbursed medical expenses incurred on behalf of the children. After that, both parties were to share responsibility for medical expenses in the same percentage as they shared responsibility for child support. The court entered a judgment against Incontro for unpaid, unreimbursed medical expenses and attorney fees and directed that, except as modified, its original decree of paternity was to remain in full force and effect. The modification order did not address any issues regarding Incontro's obligation to pay child support.

On March 23, 2007, Incontro filed a second application to modify the paternity decree. Incontro alleged that there had been a change in circumstances such that his income had been substantially reduced by at least 10 percent. Incontro alleged that this change of circumstances was not contemplated at the time of the entry of the paternity decree. He alleged that this change in financial circumstances had lasted 3 or more months and could reasonably be expected to last for an additional 6 or more months.

The district court conducted a hearing on the second application to modify. At the hearing, Incontro testified that he and Renner were married on November 17, 2004. According to Incontro, Renner "wouldn't marry me to protect her company, unless I signed that company over to her with an agreement that we would both work together and earn money when I was there." On November 17, Incontro signed a "Declaration of Gift," purportedly giving Renner his 5,000 shares of Hair Tech stock. Renner and Incontro eventually dissolved their marriage on May 30, 2007.

Incontro vaguely explained why his income decreased. He testified that his income decreased as a result of losing his clientele and financial hardships in his marriage. Incontro alleged that because he exercised his right of first refusal of visitation at least four times a week until the right was vacated by a court order, his clientele decreased. And because his

clientele decreased, his income decreased. He testified that since March 2005, he has tried to rebuild his clientele, but he provided no explanation as to why he has been unable to bring it back to its previous level.

Incontro further testified that because of financial difficulties during his marriage with Renner, Renner started separating all of their finances. As a result, Incontro testified that the only income he received was the income he earned from working at the salon. The only explanation Incontro gave regarding the financial difficulties he suffered was that he could not pay his child support obligation. The record reveals that Incontro is behind on his child support payments.

Incontro's income tax returns show that his gross income was $24,777.60 in 2004, $15,827.50 in 2005, and $9,376 in 2006. Incontro testified that for the first half of the year in 2007, his income was approximately $9,000. In 2005 and 2006, Incontro filed a joint tax return with Renner. In 2006, Incontro and Renner's adjusted gross income was $78,579, and in 2005, their adjusted gross income was $82,745.

Incontro admitted that he had ample opportunity to request a change in child support before the June 2006 modification order was entered. He testified that from June 2006 to August 2007, nothing about his financial situation had changed.

As part of Incontro and Renner's dissolution decree, Incontro received certain benefits. The decree provides:

> (a) . . . Incontro may remain at the property located at 3873 Gold Street Apt. 1 for 36 months beginning the date of final divorce and expiring in 36 months, free of rent in exchange that he provide all maintenance work, and manage all three apartments.
>
> (b) . . . Incontro is allowed to retain employment at Hair Tech . . . receive free supplies, free cell phone services, and to include the 36 months free rent provided he does all the maintenance and repairs at Hair Tech.
>
> Items a and b are in exchange for [Incontro's] agreement to honor [t]he Declaration of Gift that was dated November of 2004.

Incontro testified that he did not know how much any of these benefits were worth.

On August 16, 2007, the court entered a second modification order. The court concluded that since the entry of the September 17, 2004, paternity decree, there had been an unanticipated and uncontemplated change in circumstances such that Incontro's income had been reduced—resulting in a variation by 10 percent or more downward of his current child support obligation. Thus, the court reduced Incontro's child support obligation to $479.62. The district court also reduced Incontro's percent of unreimbursed medical expenses to 44.41 percent.

The Court of Appeals reversed the district court's second modification order, concluding that Incontro failed to show a material change in circumstances subsequent to the first modification order, which was not contemplated when the first modification order was entered.[1] We granted Incontro's petition for further review.

ASSIGNMENTS OF ERROR

Incontro argues that the Court of Appeals erred (1) in applying principles of res judicata, (2) by determining that the district court erred in finding that there was a material change of circumstances since entering the decree, and (3) by finding that an application to change custody bars a later application to modify child support.

STANDARD OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.[3]

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[1] *Incontro v. Jacobs*, No. A-07-991, 2008 WL 2231060 (Neb. App. May 27, 2008) (selected for posting to court Web site).

[2] *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002).

[3] *Id.*

ANALYSIS

[3-6] Child support orders are always subject to review and modification.[4] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.[5] A decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, but only those anticipated changes which were specifically noted on the record at the time the previous order was entered will prevent modification.[6] A proceeding to modify a child support order is neither a retrial of the original case nor a review of the original decree.[7]

We recognize that Incontro's income had changed by the time he sought custody and child support prior to the entry of the first modification order. However, the Court of Appeals erred in concluding that for this reason alone, Incontro was subsequently barred from seeking a modification of his child support obligations. Clearly, the changes that Incontro relies on in seeking a modification of his child support obligation were not part of the first modification proceedings. The first modification order does not make any mention of child support. From our review of the record, we conclude the facts Incontro alleged in his second application to modify child support based on a reduction in his income were not on the record at the time either the original decree or previous modification was entered. Instead, these facts were introduced to the court at the hearing in August 2007. Further, the June 2006 modification did not address the issue of modifying child support for a change in circumstances based on Incontro's income. As the court noted, the first application for modification asked for child support; however, such a request was obviously

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[4] *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

[5] See, *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005); *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000).

[6] See *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

[7] See *id.*

contingent upon the court's granting Incontro custody of the children. The court's first modification order ultimately addressed only visitation, daycare expenses, and unreimbursed medical expenses. It did not, in any way, reevaluate the child support award.

At this time, Incontro is paying child support based upon his yearly income as it was in 2004, and the focus should be on whether the present circumstances are substantially and materially different than they were when the court established Incontro's child support obligation. As such, the Court of Appeals incorrectly used the June 2006 modification order to determine whether a material change of circumstances had occurred.

[7] Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[8] Thus, we consider whether the district court abused its discretion in finding that there was a material change in circumstances warranting a reduction in Incontro's child support payments. According to Jacobs, Incontro intended to deliberately reduce his income before calculating child support and voluntarily reduced his income by giving away his shares of Hair Tech to Renner as a gift.

[8,9] The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.[9] We have said, "'"Material change in circumstances"' in reference to modification of child support is analogous to modification of alimony for '"good cause."'. . ."[10]

[10,11] Courts may consider various factors to determine whether a material change in circumstances has occurred.[11] Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the

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[8] *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

[9] See *Morrill County v. Darsaklis*, 7 Neb. App. 489, 584 N.W.2d 36 (1998).

[10] *Schulze v. Schulze*, 238 Neb. 81, 85, 469 N.W.2d 139, 142 (1991).

[11] *Id*.

financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.[12] But, the paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.[13]

[12-16] In general, child support payments should be set according to the Nebraska Child Support Guidelines.[14] According to the guidelines, "If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources."[15] As such, in determining the amount of child support a parent is obligated to pay, parental earning capacity is a considered factor.[16] It is invariably concluded that a reduction in child support is not warranted when an obligor parent's financial position diminishes due to his or her own voluntary wastage or dissipation of his or her talents and assets and a reduction in child support would seriously impair the needs of the children.[17]

In *Schulze v. Schulze*,[18] we reversed the order of the trial court, which reduced the amount of the noncustodial father's child support obligation. At the entry of the marital dissolution decree, the father was in a partnership that owned a painting business. Subsequently, the father dissolved his painting

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[12] *Rhoades v. Rhoades*, *supra* note 5; *Swenson v. Swenson*, 254 Neb. 242, 575 N.W.2d 612 (1998).

[13] See *Wagner v. Wagner*, *supra* note 6.

[14] *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004).

[15] Neb. Ct. R. § 4-204.

[16] See, Neb. Rev. Stat. § 42-364(4) (Reissue 2008); *Schulze v. Schulze*, *supra* note 10.

[17] *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Schulze v. Schulze*, *supra* note 10; *Grahovac v. Grahovac*, 12 Neb. App. 585, 680 N.W.2d 616 (2004).

[18] *Schulze v. Schulze*, *supra* note 10.

business because he desired to become a nursing assistant. The father alleged that his job change from a painter to a nurse's aide decreased his adjusted gross income from $37,522 annually to $7,400 annually. We concluded that the father's earning capacity had not altered and diminished after the initial decree.[19] We stated that "the reduction in [the father's] income is attributable to his personal wishes and not the result of unfavorable or adverse conditions in the economy, [his] health, or other circumstances affecting [his] earning capacity."[20] Thus, we concluded that there was no material change of circumstances warranting a modification of the child support payments.[21]

Our de novo review of the record reveals that similarly in this case, Incontro did not meet his burden to show that a material change in circumstances has occurred which warrants a reduction in his child support obligation. Incontro testified that his income started to decrease when the original custody decree was entered because he exercised his right of first refusal "every day [he] possibly could, which was four days," and that this caused him to lose clientele. However, Incontro's right of first refusal was terminated by the court in March 2005. When asked to explain why his income has decreased, Incontro could only explain as follows:

> I had a lot of money problems in my marriage, so things had started being separated by . . . Renner. So the money that I was actually earning was the money that I made behind the chair, so I was more going on my own because of disputes and arguments within my marriage.

Further, the record reveals that Incontro gave Renner his 50-percent share of stock in Hair Tech for no valuable consideration. However, in Renner and Incontro's dissolution of marriage decree, the court ordered that Incontro receive certain benefits in exchange for Incontro's honoring the "Declaration of Gift" dated November 17, 2004. While Incontro failed to

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[19] *Id.*

[20] *Id.* at 86, 469 N.W.2d at 142.

[21] *Id.*

produce documentation that would reflect the precise amounts, it is clear that his income decreased after he voluntarily gave to Renner his shares in Hair Tech.

From these facts, we conclude that Incontro has not shown how his income has reduced through no fault of his own. Rather, the record indicates that Incontro's income decreased due to his own personal wishes, and not as a result of unfavorable or adverse conditions in the economy, his health, or other circumstances that would affect Incontro's earning capacity. While the amount of Incontro's income has changed from the entry of the original child support order, he has failed to prove a change in his earning capacity. And, as far as the record reflects, the needs of the children remain the same as they existed when the district court entered the original paternity decree. For these reasons, the district court abused its discretion when it modified Incontro's child support payments based upon Incontro's change in income.

CONCLUSION

We conclude that the Court of Appeals erred in concluding that the district court could not consider Incontro's application to modify the support award because the circumstances allegedly justifying the modification were present at the time of a prior modification that did not consider child support. However, we affirm the Court of Appeals' reversal of the district court's second modification for a different reason. We find that the district court erred in concluding that Incontro had proved there was a material change in circumstances warranting a reduction in his child support obligation.

AFFIRMED.

IN RE ESTATE OF DONALD H. LIENEMANN, DECEASED.
RUTH L. LIENEMANN, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD H. LIENEMANN, DECEASED, APPELLEE, V. JEAN HILLYER, APPELLANT.

761 N.W.2d 560

Filed February 27, 2009. No. S-07-1340.

1. **Statutes: Appeal and Error.** The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
3. **Statutes: Appeal and Error.** An appellate court will not read anything plain, direct, or unambiguous out of a statute.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Roger R. Holthaus, of Holthaus Law Offices, P.C., L.L.O., for appellant.

Robert C. McGowan, Jr., of McGowan & McGowan, for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Jean Hillyer appeals the order of the district court for Sarpy County which dismissed her petition for allowance of a claim against the estate of Donald H. Lienemann (Estate). The court dismissed Hillyer's petition as barred for the reason that it was filed "61 days after the date of mailing the Notice of Disallowance." In making its ruling, the court relied on Neb. Rev. Stat. § 30-2488(a) (Reissue 2008), which provides that a claim which is disallowed "by the personal representative is barred . . . unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance." On appeal, Hillyer asks this court to

extend the 60-day requirement under § 30-2488 by 3 days due to mailing, pursuant to Neb. Rev. Stat. § 25-534 (Reissue 1995) (now found at Neb. Ct. R. Pldg. § 6-1106(e)) and to conclude that her petition was timely filed. We reject Hillyer's argument and conclude that the district court's ruling was correct as a matter of law, and we, therefore, affirm.

STATEMENT OF FACTS

On March 28, 2007, Hillyer filed a claim for $77,000 in the Sarpy County Court proceedings related to the Estate. On July 27, the personal representative of the Estate mailed to Hillyer a notice of disallowance of two claims, including the claim for $77,000. The notice included, inter alia, the following language: "Failure to protest either disallowance of claim by filing a petition for allowance, or commencing a proceeding against the personal representative regarding one or the other, or both claims within sixty days after the mailing of this notice shall result in the disallowed claims being forever barred." The notice included the personal representative's certification that the notice was mailed to Hillyer on July 27.

On September 26, 2007, Hillyer filed a petition for allowance of the claim for $77,000 in the county court for Sarpy County. The petition was subsequently transferred to the district court, apparently pursuant to § 30-2488(b), which allows for transfer at the personal representative's request.

The Estate filed a motion to dismiss pursuant to what is now codified as Neb. Ct. R. Pldg. § 6-1112(b)(1) (subject matter jurisdiction) and argued that Hillyer's petition was barred because it was not filed within the time limit set forth in § 30-2488(a), which provides in part:

> Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

The Estate argued that because the notice of disallowance was mailed on July 27, 2007, and warned of the impending bar, the

60 days within which Hillyer was required to file a petition for allowance ended on September 25 and that therefore, the petition filed September 26 was not timely.

In response, Hillyer claimed that she was entitled to 63 days to file the petition after the date the Estate mailed the notice of disallowance and that therefore, her petition for allowance was timely. In support of the argument that she had an additional 3 days within which to file the petition, Hillyer relied on § 25-534, which provided that in certain circumstances when service is made by mail, 3 days shall be added to the time within which action must be taken.

The district court agreed with the Estate's argument that the petition for allowance was required to be filed within 60 days after the mailing of the notice of disallowance, pursuant to the explicit language of § 30-2488(a). The court therefore sustained the Estate's motion to dismiss and dismissed Hillyer's petition. Hillyer appeals.

ASSIGNMENTS OF ERROR

Hillyer asserts that the district court erred in failing to add the 3 days found in § 25-534 to the time during which she had to file her claim and in concluding that her claim was not timely filed under § 30-2488(a).

STANDARDS OF REVIEW

[1] The interpretation of statutes presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

ANALYSIS

At issue in this appeal is whether the district court properly rejected Hillyer's argument that she was entitled to an additional 3 days and correctly dismissed her petition for allowance of a claim against the Estate as barred. We conclude, as a matter of law, that the district court's rulings were correct.

Section 30-2488(a) from the Nebraska Probate Code is critical to the resolution of this case. It provides as follows:

> As to claims presented in the manner described in section 30-2486 within the time limit prescribed in section 30-2485, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his or her decision concerning the claim, he or she shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his or her claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

Section 30-2488 is taken from the Uniform Probate Code. The purpose of the similarly worded predecessor of this section has been described as serving to "expedite the settlement of the estates of decedents." *In Re: Estate of J. B. Jeffries*, 136 Fla. 410, 417, 181 So. 833, 837 (1938). More recently, the purpose of this section of the probate code has been described as "promoting a speedy and efficient system for the settlement of estates." *Mathieson v. Hubler*, 92 N.M. 381, 394, 588 P.2d 1056, 1069 (N.M. App. 1978).

Consistent with its language and expeditious objective, § 30-2488(a) provides that a disallowed claim is "barred" unless a petition for allowance is filed or a proceeding commenced "not later than" 60 days after the mailing of notice of disallowance. Interpreting a statute similar to § 30-2488, the New Mexico Court of Appeals noted that "'[b]arred'" as used in the statute "means a barrier, which if interposed, prevents

legal redress or recovery." *Mathieson*, 92 N.M. at 394, 588 P.2d at 1069 (citing Black's Law Dictionary (4th ed. 1951)).

[2,3] If the time after the expiration of the 60 days is extended, as urged by Hillyer, then "barred" in § 30-2488(a) would become meaningless and of no effect as a "barrier." A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008). We will not read anything plain, direct, or unambiguous out of a statute. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

Hillyer asks this court to ignore the "barred" nature of her claim and, nevertheless, extend for 3 days the time for filing a petition for allowance of a claim based on the fact that she received the notice of disallowance by mail. Hillyer relies on the 3-day extension found in § 25-534, which provided in part:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him or her and the notice or paper is served upon him or her by mail, three days shall be added to the prescribed period.

One court rejecting a similar argument reasoned that, given the "barred" nature of the claim 60 days after mailing, the claim "'no longer exists, [and] that which has terminated, cannot be extended.'" *Mathieson*, 92 N.M. at 394, 588 P.2d at 1069. We agree with this reasoning.

In further support of her argument urging us to add a "three-day grace period," brief for appellant at 7, Hillyer refers us to *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 606 N.W.2d 85 (2000), and *Roubal v. State*, 14 Neb. App. 554, 710 N.W.2d 359 (2006). In *Schwarz*, we acknowledged the propriety of adding 3 days to the time to respond to interrogatories which had been served by mail. In *Roubal*, in its discussion of the timeliness of a petition for review in an Administrative Procedure Act case, the Court of Appeals approved of the

addition of 3 days due to service by mail, based on the statutory language providing for filing a petition "'within thirty days after the service'" of the decision. 14 Neb. App. at 556, 710 N.W.2d at 361 (emphasis omitted). See Neb. Rev. Stat. § 84-917(2)(a) (Reissue 2008).

We distinguish *Schwarz* and *Roubal* by noting that in both cases, 3 days was added to the performance of the act in question, because the statutory period for acting was *after service*; whereas under the precise language of § 30-2488(a) at issue here, a claimant must act within 60 days *after mailing* of the notice. We find it unwarranted and not sensible to add 3 days due to mailing to a statute which explicitly states an action is barred "sixty days after the mailing."

Taken as a whole, the plain language of § 30-2488(a) provides for the finality of the personal representative's decision 60 days after the mailing of the notice of disallowance, whereupon the claim is barred. We believe the Legislature chose to use a date of mailing to denote the date from which to measure when an action on the claim would be barred, and we respect such choice. See *Geddes v. York County*, 273 Neb. 271, 277, 729 N.W.2d 661, 666 (2007) (acknowledging in a Political Subdivisions Tort Claims Act case that "the Legislature chose to use a date of mailing"). We are not at liberty to ignore the very specific statutory mailing provision and treat it as though it were a generalized service provision, as urged by Hillyer.

For completeness, we note that the "sixty days after the mailing" provision found in § 30-2488(a), which is based on the 60-day Uniform Probate Code provision, has received attention by state legislatures elsewhere. Thus, in Michigan, for example, the statute comparable to § 30-2488(a) provides that the disallowed claim stands barred "unless the claimant commences a proceeding against the trustee not later than 63 days after the mailing of the notice of disallowance." Mich. Comp. Laws Ann. § 700.7507(a) (West 2002). Unlike Michigan, the Nebraska Legislature has not added an additional 3 days; given the language of § 30-2488(a), we reject Hillyer's request that we do so.

CONCLUSION

The district court correctly ruled as a matter of law that under § 30-2488(a), Hillyer's petition for allowance of a claim was barred and correctly dismissed the petition. We affirm.

AFFIRMED.

WRIGHT, J., participating on briefs.

JEFFREY L. STUEVE, APPELLEE, AND ROBERT G. KRAFKA, APPELLANT, V. VALMONT INDUSTRIES, APPELLEE.

761 N.W.2d 544

Filed February 27, 2009. No. S-08-397.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2008), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
5. **Workers' Compensation: Attorney Fees.** The power of the Workers' Compensation Court to resolve attorney fee disputes is derived from Neb. Rev. Stat. § 48-108 (Reissue 2008).
6. ____: ____. The Workers' Compensation Court is an appropriate forum for determining fees payable to a claimant's current or prior attorney for services that the attorney rendered while representing the claimant before the court.
7. **Attorney Fees.** When an attorney's services are terminated prior to the completion of representation, the attorney is entitled to the reasonable value of his or her services rendered up to the time of termination.
8. **Attorney Fees: Contracts.** An attorney fee contract is not enforceable in the absence of a showing that the amount of the claimed fee is reasonable.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

Robert G. Krafka, of Krafka Law Office, pro se.

Jeffrey L. Stueve, pro se.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant attorney Robert G. Krafka challenges two orders entered by a single judge of the Nebraska Workers' Compensation Court as affirmed by the review panel on April 2, 2008. The orders awarded Krafka an attorney's lien on a portion of a workers' compensation award entered in favor of Krafka's client, Jeffrey L. Stueve. Krafka claims that the attorney's lien was insufficient and that the review panel erred in affirming the determinations of the single judge. We reverse the decision of the review panel that affirmed the single judge's rulings, and we remand the cause with directions.

STATEMENT OF FACTS

On June 16, 2003, Krafka entered into an employment contract for legal services with Stueve. The contract stated in relevant part:

> As I explained to you, if you wish me to represent you, my fee will be THIRTY-THREE AND ONE-THIRD PERCENT (33 1/3%) of any recovery through the first trial. Any work done for you after the first trial, if it is necessary, shall result in an additional five percent (5%) being charged for appeal.

On June 29 and July 23, 2004, a 2-day trial was held on Stueve's claimed injuries, insured in connection with his employment at Valmont Industries. On December 8, the single judge entered an award in favor of Stueve. The award noted that Stueve was suffering from separate injuries that were caused by separate accidents: (1) bilateral carpal tunnel

syndrome and hand-arm vibration syndrome (HAVS) and (2) a shoulder injury that the court described as a "superior labral tear." The court ordered that for these injuries, along with certain medical expenses, Stueve should be compensated as follows: (1) from June 20 through November 7, 2003, temporary indemnity payments for the bilateral carpal tunnel syndrome and HAVS in the amount of $391.79 per week and a concurrent temporary indemnity payment of $95.21 per week for the shoulder injury, and (2) from November 8, 2003, forward, through the period of temporary total disability for the shoulder injury, temporary total indemnity payments of $391.79 per week for the shoulder injury and a concurrent payment of $95.21 per week permanent partial indemnity for the bilateral carpal tunnel syndrome and HAVS. The court found that the total permanent indemnity payable for the bilateral carpal tunnel syndrome and HAVS was $47,602.49. Krafka contends that, given this award, it is likely that Stueve will receive future payments for his shoulder injury, but that the amount of these payments is unknown.

At a hearing, on December 7, 2006, Krafka filed a motion to withdraw as counsel for Stueve and new counsel entered an appearance. According to Krafka, the parties terminated their engagement due to a difference of opinion that is not relevant to this appeal.

On January 12, 2007, the single judge held a hearing on the attorney fees due Krafka. At that hearing, Stueve indicated that Krafka was entitled to one-third of the $47,602.49 permanent indemnity award. Krafka testified that this was a complicated case and that his records indicated that he had incurred around $90,000 in attorney fees representing Stueve.

On February 7, 2007, the single judge entered an order on the issue of attorney fees. In his order, the single judge noted that Krafka sought a full fee based on the contingency fee agreement, but did not complete all of the work in Stueve's case. The single judge noted that various matters were still pending, including employer Valmont Industries' January 24, 2007, application to modify the December 8, 2004, award, motions regarding Stueve's entitlement to medical care, and an outstanding determination as to the status of Stueve's shoulder

injury as either being temporarily totally disabled or reaching permanent indemnity.

Balancing these considerations, the single judge evaluated Krafka's lien under the doctrine of quantum meruit and stated:

> The Court evaluates . . . Krafka's lien for future attorney's fees pursuant to quantum meruit doctrine and finds . . . Krafka is entitled to an attorney's fee against future temporary total indemnity payments provided by the award. However, there are pending motions regarding entitlement to medical care and now, defendant's application to modify the award. Upon a change of [Stueve's] status — i.e., . . . Stueve continues to be temporarily totally disabled but pursuant to a surgery subsequent to this order, he reaches maximum medical improvement and then becomes entitled to temporary total indemnity during a period of vocational rehabilitation or reaches maximum medical improvement and becomes entitled to permanent indemnity — . . . Krafka's entitlement to an attorney's fee will terminate, upon motion of [Stueve] and order of the Court.
>
> **IT IS THEREFORE ORDERED** that . . . Krafka has a lien for services provided equal to one-third of the temporary total indemnity payable pursuant to the Award of December 8, 2004, as provided above. Indemnity payments shall continue to . . . Krafka and . . . Stueve through . . . Krafka's office. . . . Krafka is further entitled to reimbursement of expenses in the amount of $864.55 which will be payable upon final settlement of [Stueve's] claim and further order of the Court.

On February 12, 2007, Krafka appealed this order to the review panel. On Septemer 14, the review panel entered an order of remand on review. In that order, the review panel noted that the December 8, 2004, award provided for both the payment of temporary total indemnity payments and permanent indemnity payments for member injuries, but that in the February 7, 2007, order on attorney fees, the single judge made no mention of an attorney's lien in favor of Krafka on the award of permanent indemnity benefits. The panel found that the action should be remanded to the single judge for

additional findings with respect to an attorney's lien in favor of Krafka on the award of permanent indemnity benefits.

On remand, the single judge entered an order on November 1, 2007, containing rulings relevant to this appeal, but did not include an award to Krafka of additional fees. On November 2, Krafka appealed this decision for a second review hearing by a three-judge panel. On April 2, 2008, the review panel affirmed the November 1, 2007, order, concluding that because the November 1 order on remand was not clearly wrong, it should be affirmed. Krafka appeals the review panel's order.

ASSIGNMENTS OF ERROR

Krafka lists 11 assignments of error, which we combine for analysis. Krafka assigns, restated, that the review panel erred in affirming the single judge's November 1, 2007, order. Krafka claims that the single judge erred by (1) not placing a one-third attorney's lien upon the permanent indemnity award of $47,602.49, (2) not awarding Krafka any potential attorney fees derived from a future award that Stueve would receive as the result of work completed by Krafka, and (3) not holding a hearing and making a further finding that attorney fees will be due for the permanent indemnity injury as the single judge was instructed to do by the review panel's order of remand.

STANDARDS OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2008), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on

appeal unless clearly wrong. *Id*. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. See *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008).

ANALYSIS

As an initial matter, we note that although Krafka states as the basis for appellate jurisdiction that he is appealing the single judge's order of November 1, 2007, denying him additional attorney fees, it is clear that he is appealing the review panel's order of April 2, 2008, affirming the November 1, 2007, order.

On appeal, Krafka claims that the single judge did not comply with the review panel's September 14, 2007, order remanding the case and directing the single judge to make additional findings with respect to a lien in favor of Krafka on the permanent indemnity benefits. Krafka notes that the initial single-judge December 8, 2004, award of payments to Stueve discusses two permanent indemnities: (1) the permanent award of $47,602.49 for carpal tunnel syndrome and HAVS and (2) a potential award of future damages to Stueve for his shoulder injury. Krafka complains that the single judge's November 1, 2007, order on remand does not make findings or order an attorney's lien with respect to either of these amounts.

[4-6] As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007). The power of the Workers' Compensation Court to resolve attorney fee disputes is derived from Neb. Rev. Stat. § 48-108 (Reissue 2008), which allows the compensation court to enter a lien "against any amount thereafter to be paid as damages or compensation." In *Foster*, we stated that the Workers' Compensation Court was an appropriate forum for determining fees payable to a claimant's current or prior attorney for services that the attorney rendered while representing the claimant before the court.

In this case, in its order of February 7, 2007, the single judge awarded Krafka "a lien for services provided equal to

one-third of the temporary total indemnity payable pursuant to the Award of December 8, 2004 [and] $864.55 which will be payable upon final settlement of [Stueve's] claim and further order of the Court." On appeal of this order, the review panel noted that the single judge had not addressed any award of permanent indemnity benefits in connection with the attorney's lien issue and, therefore, remanded the case for the single judge to do so.

On remand, the single judge did not alter his initial award, but, in his order of November 1, 2007, stated by way of clarification:

> As the review panel noted, . . . Stueve does not contest the payment of fees on the permanent indemnity already paid . . . Krafka for the member impairment rating. Therefore, I made no finding regarding entitlement to a lien by . . . Krafka for fees already paid. If it was the review panel's intention that collection of those fees by . . . Krafka be approved by the Court, I do so by this order. The fact of the matter is that the attorney's fees payable for the member injury were long ago paid . . . Krafka and . . . Stueve had no objection to payment.

The single judge's order on remand, however, did not elaborate on when the permanent indemnity payments for the member injury were "long ago paid" to Krafka, and in what amount, or address any future payments for the shoulder injury and their relevance to the claimed attorney's lien. Nevertheless, the review panel found, in an order filed on April 2, 2008, that because the November 1, 2007, order on remand was not clearly wrong, it should be affirmed. The review panel further stated that "[s]ince [the single judge] has now complied with the order of this review panel of September 14, 2007, the review panel further finds the order of [the single judge] of February 7, 2007, as now expanded by his order of [November 1, 2007], should also be affirmed."

As elaborated below, we conclude that the review panel's April 2, 2008, order affirming the single judge's November 1, 2007, order on remand is not reasoned, is not supported by the facts, and requires reversal. The November 1 order did not

clarify the attorney fee award, as the single judge had been directed to do by the review panel in the review panel's order remanding the case. We, therefore, reverse the review panel's order and remand the cause with directions to determine an award of attorney fees due Krafka.

[7] Krafka and Stueve signed a contingency fee agreement that awarded Krafka one-third of any amount recovered by Stueve. However, Krafka was terminated from representing Stueve before the completion of the action before the Workers' Compensation Court. In *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964), we held that when an attorney's services are terminated prior to the completion of representation, the attorney is entitled to the reasonable value of his or her services rendered up to the time of termination.

[8] More recently in *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007), this court explained that an attorney fee contract is not enforceable in the absence of a showing that the amount of the claimed fee is reasonable. In making this determination, we reasoned that "an attorney fee agreement is different from conventional commercial contracts. . . . [A]n attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and are inconsistent with the character of the profession." *Id.* at 930, 735 N.W.2d at 373. Therefore, when determining a satisfactory fee for services, the primary inquiry is reasonableness.

In *Turco*, we explained that the Code of Professional Responsibility, which was in effect when the legal services in this case were performed, enumerated eight factors to be considered as guides in determining the reasonableness of the fee. See Code of Professional Responsibility, Canon 2, DR 2-106(B). The Nebraska Rules of Professional Conduct, which are currently in effect, list the same eight factors in determining reasonableness. See Neb. Ct. R. of Prof. Cond. § 3-501.5. The factors include

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Id.

Based on this jurisprudence, and the record before us, we conclude that Krafka is entitled to a reasonable amount for the services he rendered while representing Stueve before the Workers' Compensation Court. See *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007). The value of an attorney's services is ordinarily a question of fact. *Hauptman, O'Brien v. Turco, supra.* Here, the evidence offered by Krafka established that Krafka and Stueve signed a contingent fee contract agreeing that Krafka would receive one-third of any award in favor of Stueve; that Krafka estimated he incurred the equivalent of $90,000 working on Stueve's case; and that during the pendency of this contract Stueve was awarded at a minimum $47,602.49 for his carpal tunnel syndrome and an undetermined amount of future payments for his shoulder injury. There is not a clear record of the amount Krafka has been paid to date in connection with existing awards. Further, there is not a clear order determining either the amount or the method by which Krafka is to be paid in connection with a future award, the very existence of which is due to Krafka's services.

Given the record and applicable law, we conclude that Krafka is due one-third of the amount Stueve was awarded up to the date Krafka was discharged, minus the amount Krafka has been paid to date, and a reasonable amount of any future amount Stueve will recover on his shoulder injury as a result

of the December 8, 2004, order. With respect to the latter, the record shows that any award Stueve receives for his shoulder injury is effectively due to Krafka's work. In determining a reasonable amount on any future award for the shoulder injury, the Workers' Compensation Court shall use the factors outlined in this opinion and found in the Code of Professional Responsibility as now included in the Nebraska Rules of Professional Conduct.

CONCLUSION

The review panel order of April 2, 2008, affirming the November 1, 2007, order of the single judge is reversed. The cause is remanded to the review panel to remand the matter to the single judge with directions to hold a hearing to determine the amount Krafka has been paid and the amount still owed to him, consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SANDRA S. RUTHERFORD, APPELLEE, V.
GREGORY A. RUTHERFORD, APPELLANT.
761 N.W.2d 922

Filed March 6, 2009. No. S-07-1088.

1. **Modification of Decree: Child Support.** Modification of child support is entrusted to the discretion of the trial court.
2. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Child Support: Rules of the Supreme Court.** In the event of a deviation from the Nebraska Child Support Guidelines, the trial court should state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file.
5. **Child Support: Rules of the Supreme Court: Records: Appeal and Error.** The record on appeal from an order imposing or modifying child support shall include any applicable Nebraska Child Support Guidelines worksheets with the trial court's order.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Remanded with directions.

Clay M. Rogers and Kevin J. McCoy, of Dwyer, Smith, Gardner, Lazer, Pohren & Rogers, L.L.P., and David L. Herzog for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

Gregory A. Rutherford (Greg) and Sandra S. Rutherford divorced in 1998, and Greg was ordered to pay child support for their three children. On June 27, 2005, Sandra filed a complaint for modification of child support. The Douglas County District Court increased the child support retroactive to July 2005, and Greg appeals.

In this opinion, we advise the parties and direct the trial courts that in the future, this court and the Nebraska Court of Appeals will summarily remand all appeals involving child support or modification of child support that do not contain the appropriate worksheets relative to child support or child support modification.

FACTS

Greg and Sandra were married in Omaha, Nebraska, on September 15, 1984, and had three children, born in November 1987, April 1991, and June 1994. Sandra worked as a registered nurse, and Greg was president of Tagge Rutherford Financial Group and owner of Rutherford Investment Management Company (RIMC).

When the parties divorced, Sandra was awarded custody of the children. Greg was ordered to pay monthly child support of $2,100 for three children, $1,900 for two children, and $1,750 for one child. He was also ordered to pay alimony for 78 months or until Sandra's death or remarriage. A property

settlement agreement was approved which required Greg to pay all health insurance premiums and 100 percent of uninsured medical expenses for the children.

After Sandra remarried in 2005, she filed a complaint for modification of child support. Greg remarried in 2004 and had two children with his second wife.

Following the hearing, the trial court found that Sandra had a gross salary of $62,400 per year and that Greg's annual income was $120,000. Because RIMC paid numerous personal expenses for Greg and his second wife, totaling more than $200,000 per year, the court adjusted Greg's income to $229,000 per year. It deducted 30 percent from each party's monthly income for taxes, which resulted in monthly net incomes of $3,500 for Sandra and $13,300 for Greg, or a combined monthly net income of $16,800. The court determined that Sandra's contribution equaled 21 percent and that Greg's contribution was 79 percent.

Sandra and Greg each filed a motion for new trial. After recalculating, the court determined that Greg's income was $120,000 per year, but it added expenses paid by RIMC of $150,000 to arrive at a total annual income for Greg of $270,000. The court deducted 30 percent from both parties' gross incomes for taxes and arrived at a total monthly net income of $19,250 combined. The resulting percentage allocation was 82 percent for Greg and 18 percent for Sandra.

Greg was ordered to pay $3,382.50 per month for the three children at the time of the filing of the complaint to modify, $2,969.22 for two children, and $2,316.46 for one child. The child support was made retroactive to July 1, 2005. Greg appeals from the modification. For the reasons set forth, we remand the cause with directions.

ASSIGNMENTS OF ERROR

Greg assigns the following errors: The trial court abused its discretion (1) in modifying child support to an amount unsupported by the record and in setting this amount by extrapolating from the child support guidelines without evidence of the court's calculations, (2) in considering only an increase in Greg's income without considering the needs of

the children, and (3) in failing to consider in its support calculations Greg's payment of all health insurance premiums and uninsured medical costs, as well as his obligations to his later-born children.

STANDARD OF REVIEW

[1-3] Modification of child support is entrusted to the discretion of the trial court.[1] An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.[2] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[3]

ANALYSIS

The trial court determined that the total monthly net income of the parties was $19,250 and that Greg's income accounted for 82 percent of that amount and Sandra's income amounted to 18 percent of the total. Neither party claims any error on the part of the trial court in determining the monthly net income or the allocation, and this amount shall be used by the court on remand. Rather, Greg argues that the trial court abused its discretion in its calculation of the amount of child support he should pay. Greg argues that the amount was unsupported by the record and that the court extrapolated the amount from the child support guidelines but did not provide evidence of its calculations.

The record does not include any child support worksheet prepared by the trial court. The order merely states that the court determined the parties' respective incomes and then subtracted 30 percent for taxes to calculate the monthly net income of each parent. The order says the court then "extrapolat[ed]" the income figures and used the child support guidelines.

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[1] *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005).

[2] *Id.*

[3] *Simpson v. Simpson*, 275 Neb. 152, 744 N.W.2d 710 (2008).

The child support guidelines in effect at the time of the complaint for modification provided for a maximum combined monthly income of $10,000. The guidelines stated that if the total net income exceeded $10,000 monthly, "child support for amounts in excess of $10,000 monthly [could] be more but [should] not be less than the amount which would be computed using the $10,000 monthly income unless other permissible deviations exist."[4]

For a combined monthly income of $10,000, the guidelines provided that the total child support should be $2,645 for three children, $2,326 for two children, and $1,654 for one child. Thus, the trial court ordered Greg to pay child support in excess of the guidelines based on the greater monthly income of the parties. However, because there is no worksheet in the record, we do not know why the court awarded the amount of support it did, except that the court extrapolated the amount set forth in the guidelines.

All orders concerning child support, including modifications, should include the appropriate child support worksheets.[5] Under the guidelines, a deviation in the amount of child support is allowed "'whenever the application of the guidelines in an individual case would be unjust or inappropriate.'"[6] "Deviations from the guidelines must take into consideration the best interests of the child."[7]

[4] In the event of a deviation from the guidelines, the trial court should "state the amount of support that would have been required under the guidelines absent the deviation and include the reason for the deviation in the findings portion of the decree or order, or complete and file worksheet 5 in the court file."[8]

> The importance of adhering to this requirement has been repeatedly emphasized by the appellate courts of this state. See, *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d

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[4] See Neb. Ct. R. § 4-203(C).

[5] See § 4-203.

[6] *Gress v. Gress*, 271 Neb. 122, 129, 710 N.W.2d 318, 326 (2006).

[7] *Id.* at 130, 710 N.W.2d at 327.

[8] *Jensen v. Jensen*, 275 Neb. 921, 929-30, 750 N.W.2d 335, 343 (2008).

> 670 (2001); *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Lawson v. Pass*, 10 Neb. App. 510, 633 N.W.2d 129 (2001); *Laubscher v. Laubscher*, 8 Neb. App. 648, 599 N.W.2d 853 (1999); *State on behalf of Elsasser v. Fox*, 7 Neb. App. 667, 584 N.W.2d 832 (1998). It has been stated that "the trial courts must show the appellate courts, and the parties, that they have 'done the math.'" *Stewart v. Stewart*, 9 Neb. App. 431, 434, 613 N.W.2d 486, 489 (2000).[9]

As noted, in the case at bar, we are unable to determine what the trial court considered. The court extrapolated from the guidelines, but we have no evidence of the method used to calculate the child support. The court did not complete a worksheet specifying its calculations and delineating any deviations it took into consideration.

Greg also argues that the trial court abused its discretion in failing to consider his obligations to his later-born children. Greg testified that he has two children with his second wife and that the children were born in 2005 and 2007. The guidelines provide:

> An obligor shall not be allowed a reduction in an existing support order solely because of the birth . . . of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.[10]

In *Wilkins v. Wilkins*,[11] we found no abuse of discretion in the trial court's calculation of child support for children of a first marriage while taking into consideration the father's obligation to a child from a second marriage. The trial court

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[9] *Gallner v. Hoffman*, 264 Neb. 995, 1002, 653 N.W.2d 838, 844 (2002). See, also, *Moore v. Bauer*, 11 Neb. App. 572, 581, 657 N.W.2d 25, 33 (2003) (Sievers, Judge, concurring) ("[i]n my judgment, an attorney who appeals a dissolution decree or a decree on modification of child support when the trial court has not adopted the proper worksheets is remiss in his or her duty to the client if such appeal is filed without first attempting to get the trial court to correct its obviously erroneous decree").

[10] Neb. Ct. R. § 4-220.

[11] *Wilkins v. Wilkins*, *supra* note 1.

determined child support in an interdependent manner that considered the obligation to each family.[12] In this case, there is no worksheet to assist us in determining whether the trial court took into consideration Greg's children from his second marriage when it extrapolated the amount of child support from the guidelines.

Greg also complains that the trial court failed to take into consideration that he pays health insurance premiums for the children. Evidence was presented that RIMC pays $437 per month for health insurance, but the record does not indicate who is covered by the insurance or whether Greg paid this amount from the income the court assessed to him. Greg paid medical expenses, such as those for doctor visits and physical examinations, and dental and orthodontia expenses for the children, but no evidence was presented to show the amounts of these expenses. The guidelines provided that a parent who requests an adjustment in child support for health insurance premiums "must submit proof of the cost of the premium."[13] Without a worksheet, this court cannot determine whether expenses for health insurance or health care for the children were taken into consideration in the modification.

The trial court abused its discretion by failing to complete a worksheet as to the method it used to determine the modification of child support. Failure to comply with the requirements set forth in the guidelines is an abuse of discretion. We therefore remand the cause to the trial court with directions to complete any applicable worksheets and provide evidence of the calculations in its order.

This court and the Nebraska Court of Appeals have previously emphasized the importance of adhering to the requirement that worksheets be provided in all appeals from orders concerning child support, including modifications.[14]

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[12] *Id*. See, also, *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992) (trial court properly factored into its calculations father's offspring of his subsequent marriage).

[13] See Nebraska Child Support Guidelines, worksheet 1, fifth comment.

[14] See, *Gallner v. Hoffman*, *supra* note 9; *Stewart v. Stewart*, 9 Neb. App. 431, 434, 613 N.W.2d 486, 489 (2000) ("[i]t is not within the trial court's discretion to forgo completion of the worksheet").

Henceforth, if a trial court fails to prepare the applicable worksheets, the parties are required to request that such worksheet be included in the trial court's order. Orders for child support or modification which do not contain such worksheets will on appeal be summarily remanded to the trial court so that it can prepare the worksheets as required by the guidelines. Such requirement is set forth in this court's rules.[15]

[5] Therefore, effective upon the filing of this opinion, the record on appeal from an order imposing or modifying child support shall include any applicable worksheets with the trial court's order. Failure to include such worksheets in the record will result in summary remand of the trial court's order.

CONCLUSION

The cause is remanded with directions that the trial court prepare an order of modification consistent with this opinion.

REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., participating on briefs.

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[15] See § 4-203.

STATE OF NEBRASKA EX REL. L. TIM WAGNER, DIRECTOR OF INSURANCE OF THE STATE OF NEBRASKA, AS LIQUIDATOR OF AMWEST SURETY INSURANCE COMPANY, APPELLANT, V. UNITED NATIONAL INSURANCE COMPANY ET AL., APPELLEES.

761 N.W.2d 916

Filed March 6, 2009. No. S-07-1160.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Insurance: Contracts.** If the terms of an insurance policy are clear and unambiguous, then those terms will be enforced.

4. ____: ____. Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.
5. **Contracts: Public Policy.** It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands.
6. **Contracts.** Unless the case is one that is free from doubt, the respective parties to a contract bear risks that the conditions under which the contract was entered will change and become less favorable to them over the course of the contract's term.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Robert L. Nefsky, John H. Binning, and Jane F. Langan, of Rembolt Ludtke, L.L.P., and Mark I. Wallach and Matthew M. Mendoza, of Calfee, Halter & Griswold, L.L.P., for appellant.

Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., and, of Counsel, Michael P. Comiskey and Hugh S. Balsam, of Locke, Lord, Bissell & Liddell, L.L.P., for appellee United National Insurance Company.

Kevin J. Schneider and Travis P. O'Gorman, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and R. Douglas Rees and Lauren N. Pierce, of Cooper & Scully, P.C., for appellee General Agents Insurance Company of America, Inc.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

L. Tim Wagner, acting as liquidator, appeals the order of the Lancaster County District Court granting summary judgment to United National Insurance Company (United National) and General Agents Insurance Company of America, Inc. (GAINSCO). The liquidator was acting pursuant to the authority granted him under the Nebraska Insurers Supervision, Rehabilitation, and Liquidation Act, Neb. Rev. Stat. § 44-4801

et seq. (Reissue 1998) (Liquidation Act), on behalf of the insolvent insurance company, Amwest Surety Insurance Company (Amwest). The district court found that a regulatory exclusion within the United National and GAINSCO insurance policies applied to Amwest and the liquidator, and granted summary judgment to the insurance companies. The liquidator claims the regulatory exclusions contained in the policies do not apply to the liquidator in his statutory capacity and that, in any case, the exclusion is void as against public policy. We find the regulatory exclusion does apply and is not void as against public policy. We therefore affirm.

BACKGROUND

Amwest is an insolvent Nebraska insurance company in liquidation pursuant to the Liquidation Act. The Director of Insurance was appointed to serve as liquidator for Amwest under § 44-4818(1). Amwest's headquarters were previously located in Calabasas, California, and it is a wholly owned subsidiary of Amwest Insurance Group, Inc., a Delaware corporation. United National is a Pennsylvania corporation with its place of business in Pennsylvania, but is licensed to sell, and has sold, insurance in the State of Nebraska. GAINSCO is an Oklahoma corporation with its principal place of business located in Texas. GAINSCO is also engaged in the business of insurance and is licensed to sell, and has sold, insurance in Nebraska. GAINSCO has since been dismissed from the action, however, and Wagner has since died and has been replaced by his successor in office, Ann Frohman. (For simplicity, when referring to the actions of the director while serving as liquidator, we will use the term "the liquidator.")

Amwest purchased a "Directors, Officers and Corporate Liability" (D&O) insurance policy from National Union Fire Insurance Company (National Union) of Pittsburgh, Pennsylvania, on September 30, 1999. Amwest also purchased D&O policies from United National and GAINSCO. The United National policy was in excess to the National Union policy, and the GAINSCO policy was in excess to both policies. Each supplemental policy carried a limit of $5 million.

The liquidator filed this action against the insurance companies on January 26, 2006. This action is closely related to the liquidator's separate lawsuit against the directors and officers of Amwest. The liquidator has alleged that Amwest became insolvent through the wrongful conduct and breach of multiple fiduciary duties of its officers and directors. The liquidator brought the action to request that the district court invalidate the regulatory exclusions contained in both the United National and GAINSCO policies. The United National regulatory exclusion provides:

> This Policy does not apply to any **Claims** brought by or on behalf of, any insurance regulatory agency or supervisory authority including but not limited to any state or local insurance department or Commission, or any state or local Insurance Guaranty or Insolvency Fund (any of the foregoing organizations hereafter referred to as an "Agency"), including any type of legal or equitable action which such Agency has the legal right to bring as receiver, conservator, liquidator or assignee of the insured, its security/unit holders or its creditors, or otherwise; whether such action or proceeding is brought in the name of such Agency or by or on behalf of such Agency in the name of any other entity(ies) or solely in the name of any third entity(ies).

The district court found that the regulatory exclusion applied to the liquidator and was not void as against public policy and granted summary judgment to United National and GAINSCO. The liquidator appeals.

ASSIGNMENTS OF ERROR

The liquidator assigns that the district court erred in (1) finding that the regulatory exclusion applied to the liquidator and (2) failing to hold that the regulatory exclusion was void as against public policy.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be

drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1]

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[2]

ANALYSIS

Regulatory Exclusion Applies to Liquidator

We first address the argument that the regulatory exclusion in the policy does not apply to the liquidator. Essentially, the liquidator argues that the position of liquidator cannot be considered as an "'agency, authority, department, fund, or organization'" under the regulatory exclusion.[3] United National argues that because the Director of Insurance is the liquidator, the liquidator is a "'supervisory authority'" under the regulatory exclusion.[4] The liquidator claims that the role of liquidator is legally separate from the role of Director of Insurance and that the liquidator is an officer of the court and is under the authority of the court. For that reason, the liquidator claims he cannot be considered as either an "'agency'" or an "'authority.'"[5] We do not find this argument persuasive.

Section 44-4818(1) provides that the Director of Insurance and his or her successors in office shall be appointed as liquidator of an insolvent domestic insurance company. The liquidator is granted statutory authority to act under § 44-4821. The statute states that "[t]he liquidator shall have the power" to (among other things) appoint a special deputy to act for him or her, employ various personnel and experts as necessary, appoint an advisory committee with approval from the court, fix compensation for employees, pay reasonable

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[1] *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[2] *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

[3] Brief for appellant at 14.

[4] Brief for appellee United National at 13.

[5] Brief for appellant at 14.

compensation, hold hearings, audit books and records, and collect debts and money.

The language of United National's regulatory exclusion specifically precludes

> any type of legal or equitable action which such Agency has the legal right to bring as receiver, conservator, *liquidator* or assignee of the insured . . . whether such action or proceeding is brought in the name of such Agency or by or on behalf of such Agency in the name of any other entity(ies) or solely in the name of any third entity(ies).

(Emphasis supplied.)

The district court pointed out in its order that while the roles of liquidator and director are not identical, "the Director while serving as Liquidator still carries out regulatory and supervisory functions in an effort to oversee the business of insurance in Nebraska." The language of the regulatory exclusion clearly applies to the liquidator in this case.

[3,4] We have previously held that if the terms of an insurance policy are clear and unambiguous, then those terms will be enforced.[6] And insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. If the terms of the contract are clear and unambiguous, they are to be taken and understood in their plain, ordinary, and popular sense.[7] We find that the plain language of the regulatory exclusion applies to the liquidator.

Regulatory Exclusion Is Not Void as Against Public Policy

We next turn to the liquidator's argument that the district court erred when it failed to invalidate the regulatory exclusion as against public policy. The liquidator argues that because § 44-4821 grants the liquidator the right to enforce all the rights, remedies, and powers of any insured, creditor, or shareholder, the regulatory exclusion is in direct conflict with the provisions of the Liquidation Act. The liquidator also argues

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[6] See *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

[7] *Id.*

that the regulatory exclusion is against public policy, because the exclusion blocks the liquidator's ability to carry out his or her statutory duties.

The liquidator cites § 44-4821(1)(h) and (u). Section 44-4821(1)(h) grants the liquidator the power "[t]o collect all debts and money due and claims belonging to the insurer, wherever located . . . ." The power to collect debts was granted for three express purposes: "[t]o institute timely action in other jurisdictions . . . [t]o do such other acts as are necessary or expedient to collect, conserve, or protect its assets or property . . . and . . . [t]o pursue any creditor's remedies available to enforce his or her claims."[8] Section 44-4821(1)(u) grants the liquidator the power "[t]o exercise and enforce all the rights, remedies, and powers of any insured, creditor, shareholder, or member, including any power to avoid any transfer or lien that may be given by the general law . . . ."

There is no direct conflict between the statutory provisions and the regulatory exclusion. The liquidator argues that the statute grants the liquidator any remedies available to an insured, creditor, shareholder, or member and that the regulatory exclusion strips one of those remedies from the liquidator. The regulatory exclusion does not conflict with the statute, because under the terms of the policy, the liquidator may still have a claim against the personal assets of the directors and officers.

[5,6] We have continuously upheld the freedom to contract.[9] We have also stated that "'"[i]t is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands."'"[10] Unless the case is one that is free from

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[8] § 44-4821(1)(h)(i) to (iii).

[9] *Parkert v. Lindquist*, 269 Neb. 394, 693 N.W.2d 529 (2005); *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000); *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985).

[10] *OB-GYN*, *supra* note 9, 219 Neb. at 204, 361 N.W.2d at 554, quoting *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 62 N.W.2d 288 (1954).

doubt, "[t]he respective parties to a contract bear risks that the conditions under which the contract was entered will change and become less favorable to them over the course of the contract's term."[11]

The liquidator, as Director of Insurance, approved, or did not disapprove, a significant number of exclusions like the one involved in this case. In his deposition, the liquidator conceded there is no stated public policy addressing regulatory exclusions in Nebraska. And the district court pointed out that in Nebraska, "it is the Director of Insurance's duty to approve or disapprove insurance policies based on their conformance with public policy and the provisions and intent of the law in Nebraska."

Although we have said that the sole fact that the Department of Insurance approves a policy is not determinative,[12] the liquidator, as director, admitted he was unaware of a clear public policy prohibiting regulatory exclusions. Furthermore, there is no statutory requirement that an insurance company carry D&O coverage. Upholding the regulatory exclusion does not violate any clearly articulated public policy in Nebraska, but voiding the provision would undermine our policy supporting freedom to contract. We therefore find that the regulatory exclusion does not violate public policy, and we find that the liquidator is barred from recovery under the regulatory provision.

CONCLUSION

The plain language of the regulatory provision applies to the liquidator, and the regulatory exclusion does not violate a clearly articulated public policy. We therefore affirm the decision of the district court granting summary judgment to United National.

AFFIRMED.

GERRARD, J., participating on briefs.
WRIGHT, J., not participating.

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[11] *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 523, 633 N.W.2d 102, 109 (2001).

[12] *Rawlings v. Amco Ins. Co.*, 231 Neb. 874, 438 N.W.2d 769 (1989).

STATE OF NEBRASKA, APPELLEE, V. KENNETH RHODES, APPELLANT.

761 N.W.2d 907

Filed March 6, 2009. No. S-07-1198.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
3. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
6. **Attorney and Client: Trial: Testimony: Waiver.** A defendant who has been fully informed of the right to testify may not acquiesce in his or her counsel's advice that he or she not testify, and then later claim that he or she did not voluntarily waive such right.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

James R. Mowbray and Robert W. Kortus, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Kenneth Rhodes was convicted in 1998 of possession of a firearm by a felon and found to be a habitual criminal. He was sentenced to 40 to 60 years' imprisonment. Rhodes sought postconviction relief. Following an evidentiary hearing, Rhodes' request was denied. He appeals. We affirm the district court's denial of postconviction relief.

FACTUAL BACKGROUND

On December 31, 1997, officers with the Grand Island Police Department initiated a traffic stop of the vehicle which Rhodes was operating. A subsequent search uncovered a shotgun wrapped in a towel in the back seat of Rhodes' vehicle. Further investigation revealed that Rhodes was a felon; in addition, law enforcement believed that Rhodes' operator's license had been suspended and that Rhodes had been operating the vehicle while under the influence of drugs or alcohol.

An amended information was filed against Rhodes on April 17, 1998, charging him with one count of possession of a firearm by a felon; driving under the influence (DUI), first offense; driving during suspension (DUS), second offense; and being a habitual criminal. Following a bench trial held on July 27, Rhodes was found guilty of being a felon in possession of a firearm and not guilty of the DUI and DUS charges. The habitual criminal charge was deferred pending an enhancement hearing.

At the enhancement hearing, evidence of prior felony convictions was introduced: convictions in 1977 for first degree sexual assault and sodomy, and a conviction in 1988 for attempted first degree sexual assault. Rhodes was found to be

a habitual criminal and was subsequently sentenced to 40 to 60 years' imprisonment. On appeal, in case No. A-98-1142, Rhodes' conviction and sentence were affirmed in a memorandum opinion filed on June 2, 1999, by the Nebraska Court of Appeals. Rhodes filed a petition for further review, which was denied. Rhodes was represented by the Hall County public defender's office at trial and on direct appeal.

Rhodes sought postconviction relief in 2004. He filed a pro se petition, but was later appointed counsel. Counsel filed an amended and a second amended petition. An evidentiary hearing was granted. Following that hearing, postconviction relief was denied. Rhodes appeals that denial.

ASSIGNMENTS OF ERROR

On appeal, Rhodes assigns, restated, that the district court erred in not granting him postconviction relief. In particular, Rhodes alleges the district court erred by not finding that his trial counsel was ineffective for failing to (1) ascertain Rhodes' mental status and competency for trial and sentencing; (2) make plea counteroffers; (3) adequately advise Rhodes of his right to testify; and (4) address constitutional, statutory, and decisional authority which would have prevented the use of Rhodes' prior felonies both in support of the underlying charges of possession of a firearm by a felon and as enhancement for the charge of being a habitual criminal.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[1] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[2] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[3] an appellate court

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[1] *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008).

[2] *Id.*

[3] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

reviews such legal determinations independently of the lower court's decision.[4]

ANALYSIS

[2] On appeal, Rhodes assigns as error that the district court failed to find his trial counsel was ineffective in several particulars. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[5] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[6] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[7] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[8] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

[3,4] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[9] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[10]

[5] Before addressing the specific arguments Rhodes makes on appeal, we note that the issues raised are not procedurally barred. Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal,[11] when a defendant was represented

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[4] *State v. Lopez*, *supra* note 1.

[5] *Strickland v. Washington*, *supra* note 3.

[6] *State v. Lopez*, *supra* note 1.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008).

both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[12]

Failure to Ascertain Competency for Trial and Sentencing.

In his first assignment of error, Rhodes argues he received ineffective assistance of counsel when his trial counsel failed to ascertain whether he was competent for trial and again for sentencing.

A review of the record in this case indicates Rhodes had a history of drug abuse prior to his arrest. Once in custody, Rhodes was prescribed "amitriptyline." Though not entirely clear from the record, Rhodes was apparently released on bond in February 1998. On May 21, the day set for trial, Rhodes attempted to commit suicide by drug overdose.

Following his suicide attempt, Rhodes was hospitalized and then returned to custody. Upon his return to custody, Rhodes was again prescribed medication. According to Rhodes' testimony, he was not taking all of this medication, as he was "hoarding" it for a second suicide attempt.

A bench trial was held on July 27, 1998, and Rhodes was found guilty of being a felon in possession of a weapon and not guilty of DUI and DUS. On August 13, Rhodes was found to be a habitual criminal. Sentencing was set for September 22, but was continued to October 13, apparently at trial counsel's request due to Rhodes' "medical condition."

On September 24 and 27 and October 4, 1998, Rhodes wrote letters to the district court suggesting that because of the medication he was taking, he had no memory of his trial. Rhodes was eventually sentenced on October 13. Just prior to sentencing, the district court brought Rhodes' letters to trial counsel's attention; there is no indication from the record that counsel discussed the letters with Rhodes in court prior to sentencing.

We first address Rhodes' allegation that counsel failed to ascertain his competency at the time of trial. It is undisputed

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[12] *Id.*

that there is evidence Rhodes had mental health issues preceding trial. In particular, Rhodes attempted suicide just prior to trial. In addition, Rhodes' sister testified that while Rhodes was in jail, "he was more rational" than after he was released on bond. She testified that after Rhodes was released on bond, Rhodes was "different" and "way out there at times where [she] didn't even know what he was ta[l]king about." Of course, it was while released on bond that Rhodes made his suicide attempt.

But in addition to the testimony of Rhodes' sister, the record also includes the testimony of trial counsel. According to counsel, he had represented Rhodes on a number of charges over a period of about 10 years and believed he had a good "rapport" with Rhodes. The record shows that while counsel did not visit Rhodes while Rhodes was hospitalized, counsel did have contact with Rhodes between the suicide attempt and trial. Counsel testified that he had no reason to believe Rhodes was not competent to stand trial and that Rhodes' actions were consistent with counsel's history with Rhodes. Counsel testified that he believed Rhodes "would respond like Kenneth Rhodes" and "in what I would consider to be sane answers for a person of his social history."

The district court specifically found that trial counsel "had no indication in his dealings with [Rhodes] that [Rhodes] did not understand." This finding is supported by the record and is not clearly erroneous. We therefore conclude that Rhodes has failed to meet his burden of showing that counsel was deficient for failing to ascertain Rhodes' competency for trial.

Rhodes also contends that trial counsel was ineffective for failing to ascertain his competency prior to sentencing. In support of this contention, Rhodes points to the letters he wrote to the district court between trial and sentencing which suggest that Rhodes did not recall his trial or conviction. Rhodes argues that counsel's failure to address these letters with him prior to sentencing was deficient performance. Besides Rhodes' deposition testimony, these three letters are the sole evidence suggesting that Rhodes was incompetent at the time of sentencing.

The district court addressed Rhodes' contention that he was incompetent at sentencing and found Rhodes "has indicated

that he understood what was transpiring through going up to and through the trial of the matter and to the time of sentence." The district court noted it believed Rhodes' claim, coming only after conviction, was "self-serving." We find no clear error in this finding. We therefore conclude that Rhodes has also failed to meet his burden of showing that counsel was deficient for failing to ascertain Rhodes' competency at the time of sentencing.

Thus, Rhodes has failed to meet his burden to show that trial counsel was deficient for failing to ascertain Rhodes' competency at trial and at sentencing. Rhodes' first assignment of error is without merit.

Failure to Pursue Plea Agreement.

In his second assignment of error, Rhodes contends he received ineffective assistance of counsel when counsel failed to inform Rhodes that he had the ability to present counteroffers in response to the State's plea offers.

As an initial matter, there is a dispute as to the correct standard to apply in cases involving plea negotiations. The State relies upon the two-part test set forth in *Strickland* and contends that in order to show Rhodes is entitled to postconviction relief, he must show that but for his counsel's errors, the result of the plea negotiation process would be different.

On the other hand, Rhodes argues that he must show evidence that (1) for nonstrategic reasons, his or her attorney ignored a request to pursue a plea agreement and (2) the prosecution would have cooperated with the plea or had some reason to cooperate with the plea. This was the test stated by the district court; however, Rhodes argues that the district court failed to consider whether the State had reason to cooperate with the plea. In support of this standard, Rhodes relies upon *Lipson v. U.S.*[13] and *Brown v. Doe*.[14]

We have reviewed *Lipson* and *Doe* and are not persuaded that either case sets forth a standard different from the standard

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[13] *Lipson v. U.S.*, 233 F.3d 942 (7th Cir. 2000).

[14] *Brown v. Doe*, 2 F.3d 1236 (2d Cir 1993).

enunciated in *Strickland* for ineffective assistance claims. We further note that the test set forth in *Strickland* is applicable to claims for the ineffective assistance of counsel when the defendant was convicted following a trial. And the U.S. Supreme Court in *Hill v. Lockhart*[15] extended *Strickland* to challenges to guilty pleas based upon ineffective assistance of counsel. We can conceive of no reason to apply a different standard to the ineffective assistance of counsel claim presented by this case. We therefore apply *Strickland* to Rhodes' claim that his trial counsel was ineffective because he did not inform Rhodes that Rhodes could propose counteroffers to the State's plea offers. We now turn to that claim.

At his deposition, Rhodes testified that he was unaware he could make offers or counteroffers to the State's plea offers. However, Rhodes also testified that he asked counsel to communicate an offer to the State. Given the nature of that offer—that the State release Rhodes for 5 to 7 days prior to sentencing—counsel informed Rhodes that the offer was "far-fetched," and, indeed, it is unclear whether the offer was even communicated to the State. We nevertheless conclude that the fact that Rhodes requested such an offer be made is a clear indication that Rhodes was aware he could make offers and counteroffers to the State.

Rhodes suggested his own counteroffer and therefore could not have been prejudiced by any failure of trial counsel to inform him that such offers could be made. There is no indication from the record that had trial counsel informed Rhodes of this right, the results of the plea negotiation process would have been different. Rhodes has therefore failed to meet his burden of showing he was prejudiced by any alleged deficiency in his counsel's performance. Rhodes' second assignment of error is without merit.

Failure to Inform Rhodes of Right to Testify.

In his third assignment of error, Rhodes asserts that he received ineffective assistance of counsel when his counsel

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[15] *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

failed to inform Rhodes of Rhodes' right to testify in his own behalf. Rhodes contends he was not informed of his right to testify at his motion to suppress, nor was he informed he had the right to testify at trial.

We turn first to Rhodes' allegation that he was not informed he had the right to testify at trial. The district court's order specifically noted that the record was replete with references to the strategic reasons as to why Rhodes did not testify and that the matter was discussed with Rhodes. Our review of the record indicates that this finding was not clearly erroneous. Counsel testified at his deposition that he did not have any specific recollection of discussing with Rhodes the right to testify, but that as a general practice, he would have discussed it twice: initially, when all other rights were explained to Rhodes and, again, around the time of trial, when making a determination as to whether Rhodes would testify. More importantly, at his deposition, Rhodes testified repeatedly that he was aware he could testify and that he had discussed with counsel whether he should testify.

[6] A defendant who has been fully informed of the right to testify may not acquiesce in his or her counsel's advice that he or she not testify, and then later claim that he or she did not voluntarily waive such right.[16] A review of the record shows that Rhodes was informed of his right to testify and acquiesced to counsel's advice that he should not testify. We therefore conclude that Rhodes has not met his burden of showing trial counsel's performance was deficient with respect to Rhodes' allegation regarding his right to testify at trial.

We next address Rhodes' allegation that he was not informed he had the right to testify at the hearing on his motion to suppress. Rhodes contends that had he known that he could testify at this hearing, he would have testified that

> he used arm signals to signal his turn; that the temperature was cold and clothing he wore was not appropriate for that cold weather (undercutting testimony of law enforcement about [his] behavior); the slope of the road where the car was parked and how that would have

[16] See *Lema v. U.S.*, 987 F.2d 48 (1st Cir. 1993).

> effected [sic] whether the door was open; and that he . . . was not *Mirandized*.[17]

Assuming, but not deciding, that counsel's performance was deficient, we nevertheless conclude Rhodes was not prejudiced by that performance with regard to Rhodes' right to testify at the hearing on his motion to suppress. First, Rhodes asserts he could have testified that he signaled his turn with an arm signal. However, such evidence was presented at the suppression hearing through the testimony of Rhodes' passenger. Rhodes was not prejudiced by his inability to testify to this point where the evidence was nevertheless presented to the district court.

Rhodes also contends that he would have testified regarding the temperature and his attire at the time of the stop. Rhodes' proposed testimony is apparently aimed at testimony by the officers that Rhodes was "unsteady on his feet"; appeared "fidgety"; and was, in the officers' estimations, under the influence of drugs or alcohol. However, following trial, Rhodes was acquitted of the DUI charge. He could not have been prejudiced by his inability to rebut the officers' testimonies regarding whether he was under the influence when in fact he was found not guilty of such charge. We also note that one officer testified on both direct and cross-examination that the weather at the time of the stop was cold; therefore, this evidence was nevertheless presented to the district court.

Next, Rhodes argues he could have testified that the vehicle was parked on an incline during the stop. Apparently, this testimony would have been aimed at rebutting the testimony of one officer that the driver's-side door was open at the time that he, the officer, identified the shotgun on the floor behind the front driver and passenger seats. Rhodes apparently contends this was not so, because he had closed the door upon exiting the vehicle and because the slope of the road would have made the door shut automatically. However, Rhodes does not explain, nor can we conceive of, what effect this would have had on the ultimate outcome of the suppression hearing. As such, Rhodes

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[17] Brief for appellant at 24.

has again failed to establish how he was prejudiced by the fact that he did not testify.

Finally, Rhodes argues he would have testified that he was not given any *Miranda* warnings. But Rhodes' motion to suppress any statements taken in violation of *Miranda* was sustained, and no such statements were introduced into evidence. Thus, Rhodes suffered no prejudice by the lack of his testimony at the suppression hearing regarding his lack of *Miranda* warnings.

For the foregoing reasons, we conclude that Rhodes was not prejudiced by his counsel's alleged failure to inform Rhodes of his right to testify at his suppression hearing. In addition, we conclude that Rhodes and his counsel discussed Rhodes' right to testify at trial and that Rhodes acquiesced in counsel's opinion that he should not testify. As such, counsel's performance on this point was not deficient. Rhodes' third assignment of error is without merit.

Failure to Address Authority Regarding Use of Rhodes' Prior Felonies.

Finally, in his fourth assignment of error, Rhodes argues his counsel was ineffective for failing to argue that the use of one of his prior felonies to support both his underlying charge of being a felon in possession of a firearm and his habitual criminal enhancement was a violation of the Double Jeopardy and Due Process Clauses of the Nebraska and U.S. Constitutions.

A review of the record indicates that at trial, the State introduced evidence of Rhodes' 1988 attempted first degree sexual assault conviction in order to prove Rhodes was a felon and guilty of being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 2008). Then, after Rhodes was found guilty, the State introduced that same prior conviction at the enhancement hearing on the habitual criminal charge, as well as Rhodes' 1977 convictions for first degree sexual assault and sodomy. Rhodes contends that the use of the 1988 conviction both to prove the underlying charge and to enhance his sentence was a violation of double jeopardy and due process.

This court has recently considered this issue. In *State v. Ramirez*,[18] we held that using the same offense both to establish the defendant's status as a felon and to enhance that defendant's sentence was not a violation of double jeopardy. Rhodes concedes that *Ramirez* is on point, but asks us to reconsider that decision. In support of this argument, Rhodes contends this court's decision in *Ramirez* implicitly acknowledged that there is an ambiguity in the underlying statutes and that the rule of lenity requires such ambiguity to be decided in Rhodes' favor. However, in *Ramirez*, we addressed and rejected the argument that the underlying statutes were ambiguous and specifically addressed the rule of lenity in that context. We therefore decline Rhodes' invitation to revisit *Ramirez*.

Because the use of the same felony both to establish Rhodes' status as a felon and to enhance his sentence was permissible, Rhodes' sentence was lawful. Accordingly, we conclude that Rhodes has not met his burden of showing he was prejudiced by his counsel's failure to object to the use of the same conviction for both purposes. Rhodes' fourth and final assignment is without merit.

CONCLUSION

The judgment of the district court denying Rhodes' motion for postconviction relief is affirmed.

AFFIRMED.

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[18] *State v. Ramirez, supra* note 11.

STATE OF NEBRASKA, APPELLEE, V.
ANTHONY BABBITT, APPELLANT.
762 N.W.2d 58

Filed March 6, 2009. No. S-08-498.

1. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.

2. **Convictions: Evidence: Appeal and Error.** An appellate court will affirm a conviction absent prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
3. **Convictions: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
4. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
5. **Criminal Attempt: Intent.** A defendant's conduct rises to criminal attempt if he or she intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.
6. ____: ____. Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent.
7. **Criminal Attempt.** Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

John S. Berry, of Berry Law Firm, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

After a bench trial, the district court convicted Anthony Babbitt of two counts of criminal impersonation for violating Neb. Rev. Stat. § 28-608 (Reissue 2008). The court sentenced him to 3 years' probation for each count, with the sentences to run concurrently. We affirm.

This case arose when Internet Networks Computer Staffing Incorporated (INCS), and its sole officer, Anthony Babbitt, obtained default judgments against parties who were not indebted to INCS. In December 2005 and January 2006, INCS obtained judgments against six individual defendants in Lancaster County Small Claims Court. INCS claimed that the defendants failed to pay for computer services provided by

INCS. The defendants did not appear in court, and the court awarded INCS default judgments.

After INCS obtained the judgments in Lancaster County, the Douglas County sheriff's office began investigating Babbitt for judgments INCS had obtained in Douglas County Small Claims Court. Based upon evidence gathered from a search executed on Babbitt's residence, the Lincoln Police Department alerted the Lancaster County Small Claims Court that INCS' default judgments may have been fraudulently obtained. Specifically, the evidence presented to the court showed that none of the defendants whom INCS had brought claims against had used INCS' services and so did not owe INCS any money as INCS alleged. The court set aside the judgments in May 2006.

The State later charged Babbitt with six counts of criminal impersonation under § 28-608. At trial, the evidence uncovered a novel scheme where Babbitt, acting for INCS, had filed the above-mentioned claims in Lancaster County Small Claims Court. Babbitt, in filing the claims, used the names, partial Social Security numbers, and dates of birth for individuals living outside the state. Despite their out-of-state residences, he obtained judgments by using the addresses of individuals living in Lincoln who had names similar to those of the out-of-state victims. None of the individuals—those nonresidents whose names and personal information were used or those living in Lincoln whose addresses were used—had ever done business with INCS or Babbitt. Because the State convicted Babbitt of only two counts of criminal impersonation, we will discuss only the evidence regarding those two convictions.

Using information from the Internet, INCS filed a claim in Lancaster County Small Claims Court in October 2005 listing a "Robert D. Gentry" as the defendant. Although the signature on the claim is illegible, next to the signature appears the title "President INCS, Inc." The claim gave a partial Social Security number, a date of birth, and a Lincoln address for the defendant. When Robert Gentry failed to make an appearance in court, INCS obtained a default judgment for $2,098.06. The clerk then sent a default judgment notice to Robert Gentry at

the Lincoln address listed on the claim form. It was returned as undeliverable and unable to forward.

At trial, the State called two witnesses regarding the information given to the court by INCS: John Gentry, who lives at the Lincoln address, and Robert Gentry, whose name, partial Social Security number, and date of birth matched those listed on the claim. John Gentry testified that he lived at the Lincoln address since August 1992 and that no one by the name "Robert Gentry" lives at that address. He also testified that neither the partial Social Security number nor the date of birth shown on the claim was his and that he had never purchased computer services from INCS or Babbitt.

Robert Gentry, the alleged victim of the scam, lives in Mesa, Arizona, and before the trial had never been in Nebraska. He identified his name, his partial Social Security number, and his date of birth as the same as those shown on the claim. He also testified that he had never done business with INCS or Babbitt and had never given anyone permission to use his name, Social Security number, or date of birth on any document.

In November 2005, INCS filed a second claim in Lancaster County Small Claims Court listing a "Joanne Bonascorso" as the defendant. Like the Gentry claim, the signature on this claim is also illegible, but next to the signature shows the title, "President INCS, Inc." The claim provided a partial Social Security number, date of birth, and Lincoln address for the defendant. INCS obtained a judgment for $1,495.

At trial, Linda Bonascorso testified that she lived at the Lincoln address for the previous 9 years. She could not identify the name "Joanne Bonascorso," the partial Social Security number, or the date of birth listed on the claim. Joanne Bonascorso, of Las Banos, California, also testified. Although she had never been to Nebraska before the trial, the name, partial Social Security number, and date of birth listed on the claim matched her own. She too, had never heard of INCS or Babbitt.

Based upon this testimony and evidence seized from Babbitt's residence, the court convicted Babbitt of two counts of criminal impersonation. The court sentenced him to 3 years' probation on each count.

Babbitt assigns as error that the State failed to adduce sufficient evidence to support his convictions and that the trial court erred in denying his motion for a new trial.

[1,2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. We will affirm a conviction absent prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[1]

We first address Babbitt's argument that the evidence is insufficient to prove that he obtained the fraudulent judgments for INCS. Babbitt argues that someone else could have obtained the judgments for INCS.

[3,4] In finding a defendant guilty beyond a reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.[2] And remember, circumstantial evidence is not inherently less probative than direct evidence.[3]

The individual's signature who filed the claims in small claims court for INCS is illegible but the title following the signature clearly reads, "President INCS, Inc." Evidence seized from Babbitt's home during the execution of a search warrant shows that Babbitt was the only officer of INCS. The record shows no one other than Babbitt was involved in the corporation. Furthermore, a lieutenant of the Douglas County sheriff's office identified Babbitt as appearing in Douglas County Small Claims Court for INCS when Babbitt represented he was the president of INCS. But most damaging is what could be described as Babbitt's "How to Scam Kit" seized by the sheriff's department. It included notes and reminders that Babbitt had written to himself on how to scam people and how to create a "crazy" paper trail that would be difficult to follow.

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[1] See *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003).

[2] *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003).

[3] *Id.*

Viewing this evidence in a light most favorable to the State, we determine the State adduced sufficient evidences that Babbitt was the individual who obtained the judgments for INCS.

Babbitt's remaining arguments are related to his interpretation of § 28-608(1)(d). The State convicted Babbitt of two counts of criminal impersonation in violation of § 28-608, which provides:

> (1) A person commits the crime of criminal impersonation if he or she:
>
> . . . .
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another:
>
> (i) Obtains or records personal identification documents or personal identifying information; and
>
> (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Babbitt contends that although he may be guilty of some offense, his conduct does not violate § 28-608(1)(d), and that thus, the evidence is insufficient to support his convictions. Babbitt argues (1) that obtaining a fraudulent judgment in small claims court does not constitute an attempt to access the financial resources of his victims and (2) that a judgment is not a "thing of value."

Under § 28-608(1)(d), a defendant must have accessed, or attempted to access, the financial resources of his or her victim. Babbitt asserts that he did not take steps to enforce the judgments or to sell them. Thus, he argues he did not attempt to access the financial resources of any of his victims. Moreover, he argues that even if he had sold the judgments, it would have been the innocent purchaser of the judgments and not Babbitt who would have accessed or attempted to access the victims' financial resources. Babbitt presents a novel argument, but after examining § 28-608(1)(d), it loses its luster.

[5-7] A defendant's conduct rises to criminal attempt if he or she "[i]ntentionally engages in conduct which, under the

circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime."[4] Conduct "shall not be considered a substantial step . . . unless it is strongly corroborative of the defendant's criminal intent."[5] Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact.[6]

We conclude that in obtaining the judgments, Babbitt took a first and substantial step toward accessing the financial resources of his victims. After receiving the judgments, Babbitt could have attempted to execute on the judgments. Although Babbitt did not take any of these steps, the options were available to him once he received the judgments, and his obtaining the fraudulent judgments was a necessary first step in his scheme to obtain his victims' money. Thus, the State adduced sufficient evidence that Babbitt attempted to access the financial resources of his victims.

In addition, § 28-608(1)(d) requires the State to prove beyond a reasonable doubt that Babbitt used his victims' personal identifying information to attempt to access their financial resources for obtaining "credit, money, goods, services, or any other thing of value." Babbitt argues that the default judgments he obtained in small claims court are not "thing[s] of value," and, thus, he did not violate the statute. The State argues that judgments are personal property and therefore "thing[s] of value" under the statute.[7]

We conclude that whether a judgment in this case is a "thing of value" is irrelevant. Here, Babbitt's ultimate goal in obtaining the judgments was to obtain money from his victims. As discussed, his obtaining a default judgment constituted

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[4] Neb. Rev. Stat. § 28-201(1)(b) (Reissue 2008).

[5] § 28-201(3).

[6] See *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991).

[7] See Neb. Rev. Stat. § 28-109(22) (Reissue 2008) (defining "thing of value" for prosecutions under chapter 28, article 6). See, also, *State v. Spaulding*, 211 Neb. 575, 319 N.W.2d 449 (1982).

an "attempt" to access his victims' financial resources to obtain money.

We have already concluded that Babbitt attempted to access his victims' financial resources and did so to obtain money. We now focus on whether Babbitt (1) obtained personal identifying information of his victims, (2) did so without their permission, (3) did so with the intent to deceive or harm them, and (4) used that information in his attempt to access their financial resources. The district court concluded he did, and we do also.

The criminal impersonation statute defines personal identifying information as meaning "any name or number that may be used, alone or in conjunction with any other information, to identify a specific person including a person's: (i) [n]ame; (ii) date of birth; (iii) address; [and] (v) [S]ocial [S]ecurity number . . . ."[8] The evidence shows that Babbitt obtained his victims' names, partial Social Security numbers, and dates of birth and that he used those numbers without their consent. Babbitt's obtaining civil judgments for services that he had not provided showed an intent to deceive or harm his victims.

Moreover, to file the claims in small claims court, Babbitt had to provide the victims' names, partial Social Security numbers, dates of birth, and addresses. Without that information, he could not file the original claims. Because the personal identifying information leads directly to his obtaining the judgments, we conclude that Babbitt did use the personal identifying information in his attempt to access the financial resources of his victims.

Viewed in a light most favorable to the State, we determine the evidence is sufficient to prove Babbitt's convictions beyond a reasonable doubt.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

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[8] § 28-608(4)(b).

JULIE LAGEMANN, APPELLANT, V. NEBRASKA METHODIST HOSPITAL, APPELLEE.

762 N.W.2d 51

Filed March 6, 2009. No. S-08-582.

1. **Workers' Compensation: Appeal and Error.** When reviewing a compensation award under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without power or exceeded its powers; (2) the judgment, order, or award was procured by fraud; (3) the record lacks sufficient competent evidence to warrant the making of the order, judgment, or award; or (4) the compensation court's factual findings do not support the order or award.
2. ____: ____. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court independently decides questions of law.
4. **Workers' Compensation: Penalties and Forfeitures: Time: Appeal and Error.** Where a reasonable controversy exists between an employer and an employee as to the payment of workers' compensation, the employer is not liable for the penalty provided in Neb. Rev. Stat. § 48-125 (Cum. Supp. 2008) during the time the case is pending in the courts for final determination.
5. **Workers' Compensation: Time: Notice: Appeal and Error.** Under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2008), the Nebraska Supreme Court has recognized two circumstances in which the 30-day time limit applies for the payment of compensation: (1) upon the employee's notice of disability if no reasonable controversy exists regarding the claim or (2) after a final adjudicated award if one of the parties appeals and a reasonable controversy existed regarding the claim pending trial.
6. **Workers' Compensation: Final Orders: Time: Appeal and Error.** When a party appeals a workers' compensation award to an appellate court, the award is not final and the waiting-time period for payment of benefits does not commence to run until the appellate court's mandate is filed in the Workers' Compensation Court.
7. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** Ordinarily, when an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the Workers' Compensation Court. Affirmed.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellant.

Lindsay K. Lundholm and Kirk S. Blecha, of Baird Holm, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

In this workers' compensation case, Julie Lagemann appeals the review panel's decision, which followed the Nebraska Court of Appeals' mandate from her earlier appeal. The Court of Appeals had affirmed the original award of benefits. On remand, the review panel affirmed the trial judge's order that denied her waiting-time penalties, interest, and attorney fees under Neb. Rev. Stat. § 48-125 (Reissue 2004). The issue is whether under a 1999 amendment to § 48-125, if an employee appeals the review panel's decision, the employer is liable for waiting-time penalties pending an appeal for any portion of the benefits award that the employer does not cross-appeal.

We held in *Leitz v. Roberts Dairy*[1] that employees are not entitled to waiting-time penalties pending an appeal when a reasonable controversy existed regarding the employee's claim. In that circumstance, the 30-day waiting-time period does not commence until the final adjudicated award is entered. In 1999, the Legislature amended § 48-125 and effectively codified our holding in *Leitz*. Because the trial judge correctly applied *Leitz*, we affirm.

BACKGROUND

In April 2005, Lagemann sued her employer, Nebraska Methodist Hospital. She sought temporary total disability benefits, permanent disability benefits, and, under § 48-125, waiting-time penalties and attorney fees. Later, in June 2006, the trial judge awarded her benefits for temporary total disability and permanent partial disability. But it denied Lagemann waiting-time penalties and attorney fees. The trial

[1] *Leitz v. Roberts Dairy*, 239 Neb. 907, 479 N.W.2d 464 (1992).

judge found that a reasonable controversy existed regarding the cause of her injuries, impairment, and loss of earning power.

Lagemann appealed to the review panel the trial judge's finding that she only had a 25-percent loss of earning power, and the hospital cross-appealed. She did not, however, appeal the trial judge's finding that her claim presented a reasonable controversy. The review panel affirmed. Lagemann then appealed to the Nebraska Court of Appeals, and the hospital did not cross-appeal.

In a memorandum opinion filed on July 9, 2007, in case No. A-06-1421, the Court of Appeals affirmed the review panel's decision. The court's mandate was filed in the Workers' Compensation Court on August 15. Lagemann moved for waiting-time penalties, interest, and attorney fees. The trial judge received Lagemann's and her attorney's affidavits. In Lagemann's affidavit, she stated that on August 14, the hospital hand-delivered to her attorney payments covering her benefits award. The Workers' Compensation Court issued an order on the mandate on August 29.

The trial judge rejected Lagemann's argument that the Court of Appeals' memorandum opinion, issued on July 9, 2007, triggered the 30-day waiting-time period. It concluded that under *Leitz*, the 30-day period did not commence until the court's mandate was filed in the compensation court. The trial judge reasoned that the mandate was necessary to reinvest the compensation court with jurisdiction. Lagemann also argued that because her appeal involved only permanent disability, the hospital had failed to timely pay temporary disability benefits within 30 days of the review panel's order affirming her award. The review panel affirmed, concluding that the trial judge had correctly applied *Leitz*.

ASSIGNMENT OF ERROR

Lagemann claims that the trial judge erred in not finding that the hospital untimely paid that part of the award that it failed to cross-appeal. Thus, she contends that the trial judge erred in failing to find that her award was subject to waiting-time penalties.

STANDARD OF REVIEW

[1-3] When reviewing a compensation award under Neb. Rev. Stat. § 48-185 (Reissue 2004), we may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without power or exceeded its powers; (2) the judgment, order, or award was procured by fraud; (3) the record lacks sufficient competent evidence to warrant the making of the order, judgment, or award; or (4) the compensation court's factual findings do not support the order or award.[2] And on appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.[3] Statutory interpretation, however, presents a question of law, and we independently decide questions of law.[4]

ANALYSIS

A 1999 amendment to § 48-125 provides the flashpoint of the parties' dispute. Section 48-125(1) (Cum. Supp. 2008), in relevant part, now provides:

> Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death. Fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability *or after thirty days from the entry of a final order, award, or judgment of the compensation court* . . . .

(Emphasis supplied.)

The Legislature added the language italicized above through the 1999 amendment.[5]

Lagemann makes several arguments. First, she contends that because the hospital did not appeal the review panel's decision, no reasonable controversy existed whether the hospital owed

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[2] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[3] See *id.*

[4] See *Powell v. Estate Gardeners*, 275 Neb. 287, 745 N.W.2d 917 (2008).

[5] See 1999 Neb. Laws, L.B. 216.

her benefits for at least a 25-percent loss of earning power. She argues that under *Gaston v. Appleton Elec. Co.*,[6] the 30-day waiting-time period began when the review panel entered its order affirming the trial judge's decision.

Second, Lagemann contends that the Legislature's 1999 amendment of § 48-125 created two separate circumstances in which a court may award waiting-time penalties. She argues that the trial judge improperly focused on only the statute's "final judgment" component. She contends that § 48-125 also permits a court to award waiting-time penalties without a final order. She argues that requiring the Court of Appeals' mandate to be filed in the Workers' Compensation Court to commence the 30-day waiting-time period conflicts with the statute's plain language.

Third, Lagemann argues that the trial judge's and review panel's interpretation of § 48-125 was contrary to the Legislature's intent to protect workers from adverse economic consequences caused by work-related injuries. She also argues that Nebraska case law holds that employers must pay at least the benefits for which liability is undisputed.

Obviously, the hospital disagrees. It argues that the trial judge properly concluded that *Leitz* controls the case's disposition. It further argues that the "reasonable controversy" standard applies only when an employer denies benefits before an employee commences an action, not when a party appeals a trial judge's award. We agree that the reasonable controversy standard only applies when an employer denies benefits pending trial, not when an employer fails to pay benefits pending an appeal.

We have construed § 48-125 to require an employer to pay the 50-percent waiting-time penalty in the following circumstances: if (1) the employer fails to pay compensation within 30 days of the employee's notice of a disability and (2) no reasonable controversy existed regarding the employee's claim for benefits.[7] If an appellate court determines that no reasonable

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[6] *Gaston v. Appleton Elec. Co.*, 253 Neb. 897, 573 N.W.2d 131 (1998).

[7] See, e.g., *id.*; *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

controversy existed regarding the employee's claim for benefits, the employer must pay waiting-time penalties from the date of the award until it pays the benefits under the appellate court's mandate.[8] Also, even if the employer disputes in good faith the total compensation owed pending trial, the employer must pay any portion of the claim for which it admits liability.[9] Finally, when an employer appeals, it will not be excused from paying compensation 30 days following the date of the award unless the employer has an actual basis in law or fact for disputing the award.[10]

In arguing for waiting-time penalties, Lagemann relies on cases in which the court imposed penalties for an employer's failure to pay benefits pending trial after it had offered a settlement. But here, the hospital did not admit any liability pending trial. Nor did Lagemann appeal the trial judge's finding that a reasonable controversy existed. And she does not contend that the hospital's appeal was unjustified. Her reliance is misplaced. Those cases involved an employer's pretrial admission of liability—not waiting-time penalties pending appeal.

[4] In *Leitz*, we specifically considered whether the plaintiffs were entitled to waiting-time penalties pending the employer's appeal. We held:

> Where a reasonable controversy exists between an employer and an employee as to the payment of workers' compensation, the employer is not liable for the penalty provided in Neb. Rev. Stat. § 48-125 (Reissue 1988) during the time the case is pending in the courts for final determination. . . . Because a reasonable controversy existed . . . the plaintiffs were not entitled to a

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[8] See, *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998); *Mendoza, supra* note 7; *Abel Construction Co. v. Goodman*, 105 Neb. 700, 181 N.W. 713 (1921).

[9] See, *Grammer v. Endicott Clay Products*, 252 Neb. 315, 562 N.W.2d 332 (1997); *Musil v. J.A. Baldwin Manuf. Co.*, 233 Neb. 901, 448 N.W.2d 591 (1989); *Kubik v. Union Ins. Co.*, 4 Neb. App. 831, 550 N.W.2d 691 (1996).

[10] *Roth, supra* note 8; *Mendoza, supra* note 7.

> penalty payment during the pendency of the appeal to this court.[11]

But we also held that the waiting-time penalty "applies not only to interim payments of compensation, but also to fully litigated cases."[12] We reasoned that because contested claims cause a delay of compensation, it is imperative to discourage any further delay following an appeal.

[5] Thus, in *Leitz*, we recognized two different circumstances under § 48-125 in which the 30-day time limit applies for the payment of compensation: (1) upon the employee's notice of disability if no reasonable controversy exists regarding the claim or (2) after a final adjudicated award if one of the parties appeals and a reasonable controversy existed regarding the claim pending trial. In two 1998 cases involving employer appeals, we similarly stated that under § 48-125, waiting-time penalties apply to final adjudicated awards.[13] The Legislature's amendment of § 48-125 did not overturn our holding in *Leitz*.

While our case law is generally consistent with *Leitz*,[14] we recognize that some of our cases suggest that an employer must pay an award pending an appeal.[15] Even recently, we have stated, "Generally, where there has been an award of benefits, the employee is not to be left without those benefits during appeal."[16] But to the extent our cases have not been consistent, the issue has been decided by the Legislature.

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[11] *Leitz*, *supra* note 1, 239 Neb. at 909, 479 N.W.2d at 466, citing *Steward v. Deuel County*, 137 Neb. 516, 289 N.W. 877 (1940), and *Abel*, *supra* note 8.

[12] *Leitz*, *supra* note 1, 239 Neb. at 910-11, 479 N.W.2d at 467.

[13] See, *Gaston*, *supra* note 6; *Roth*, *supra* note 8.

[14] See, *Steward*, *supra* note 11; *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938); *Claus v. DeVere*, 120 Neb. 812, 235 N.W. 450 (1931), *overruled on other grounds*, *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978).

[15] See, *Osborn v. Omaha Structural Steel Co.*, 105 Neb. 216, 179 N.W. 1022 (1920); *Updike Grain Co. v. Swanson*, 104 Neb. 661, 178 N.W. 618 (1920).

[16] *Gibson v. Kurt Mfg.*, 255 Neb. 255, 265, 583 N.W.2d 767, 773 (1998), citing 8 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.54 (1998).

As noted, in 1999, the Legislature amended § 48-125.[17] Before the amendment, § 48-125 did not correspond to this court's holding in *Leitz*. It provided a waiting-time penalty only after an employee's notice of disability: "[F]ifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability."[18] The amendment, as relevant here, revised § 48-125 to provide a second circumstance in which a waiting-time penalty applies: "[F]ifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability *or after thirty days from the entry of a final order, award, or judgment of the compensation court*."[19]

[6] If the Legislature had intended to overturn our decision in *Leitz*, it would have specified that waiting-time penalties are available pending an appeal for any uncontested portion of the award. To the contrary, the Legislature has codified our holding in *Leitz* by recognizing the additional circumstance in which the 30-day time limit applies following litigation. Under *Leitz*, when a party appeals a workers' compensation award to an appellate court, the award is not final and the waiting-time period for payment of benefits does not commence to run until the appellate court's mandate is filed in the Workers' Compensation Court. Regarding the original circumstance for awarding waiting-time penalties, the Legislature did not amend that language.

[7] Ordinarily, when an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.[20] Because the Legislature did not change the original language, waiting-time penalties under this part of the statute apply only in the two circumstances delineated by this court in *Leitz* and later cases.

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[17] See L.B. 216.

[18] § 48-125(1) (Reissue 1998).

[19] § 48-125(1) (Reissue 2004) (emphasis supplied). See L.B. 216.

[20] See *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004).

Those circumstances are the employer's obligation to pay claims (1) upon the employee's notification of a disability before an adjudication or (2) after a final adjudicated award is entered. The "final adjudicated award" circumstance is now subsumed in the amendment's added language. Thus, the "after thirty days' notice" language only applies to an employer's failure to timely pay benefits pending trial. We conclude that the 1999 amendment simply made § 48-125 consistent with our holding in *Leitz* and did not authorize the Workers' Compensation Court to impose waiting-time penalties absent a final adjudication when a party appeals. We affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM C. PETERS, JR., RESPONDENT.

762 N.W.2d 294

Filed March 13, 2009. Nos. S-07-517, S-07-960.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings. When credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Evidence: Proof: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
4. **Evidence: Words and Phrases.** Clear and convincing evidence means more than a preponderance but less than evidence beyond a reasonable doubt.
5. **Disciplinary Proceedings.** Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
6. ____. In evaluating attorney discipline cases, the Nebraska Supreme Court considers aggravating and mitigating circumstances, the attorney's conduct underlying the charges and throughout the proceeding, and the propriety of a sanction with the sanctions imposed in similar cases.
7. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.

Original actions. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Maren Lynn Chaloupka and Robert Paul Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

I. NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court brought formal charges against William C. Peters, Jr., a member of the Nebraska State Bar Association. The formal charges alleged that Peters violated certain disciplinary rules and his oath of office as an attorney. The charges were filed in two separate cases that have been consolidated.

Peters was found by a court-appointed referee to have violated sections of the Code of Professional Responsibility and the Nebraska Rules of Professional Conduct. The referee recommended that Peters' license to practice law be suspended for 60 days and that upon reinstatement, he be required to engage an attorney to monitor his practice for 1 year at his own cost. The Counsel for Discipline filed exceptions to the recommended sanction as being too lenient. Peters also filed exceptions to the referee's report.

II. FACTS

1. JULIE A. SCHMUNK

The formal charges against Peters in case No. S-07-517 allege that he was hired by Julie A. Schmunk, formerly known as Julie A. Wyatt (Julie), to represent her in a dissolution of marriage case. Kerry Wyatt (Kerry), Julie's husband at the time, was not represented by separate counsel. Kerry and Julie reached an amicable settlement of all issues and signed a property settlement agreement prepared by Peters, and a decree was entered on August 17, 2004.

One asset of the parties was a Thrift Savings Plan (TSP) account containing approximately $40,000 that was in Kerry's name only. In order to liquidate the account without a penalty, the account had to be awarded to Julie as part of the divorce decree. When the decree of dissolution and property agreement were submitted to the TSP finance center for disbursement, the administrators of the plan determined that the decree was sufficient to award a one-half share of the account to Julie, and that amount was paid to her in December 2004. However, the administrators determined that the decree was not properly worded to allow for disbursement of the other half of the account, and Kerry and Julie were notified of the problem.

In a letter to the Counsel for Discipline, Kerry stated that he had explained to Peters that he had both a survivors benefit plan and a TSP account and claimed that he had provided all the information Peters would need to prepare the divorce decree and property settlement. Kerry said Peters knew of the problem with the TSP account payment in the fourth quarter of 2004. After Kerry learned that the wording in the divorce decree would not allow the second payment from the TSP account, he contacted Peters, who agreed to work on the problem. Kerry said that he continued to contact Peters by fax, telephone, and e-mail and that he provided Peters with the contact information for the TSP legal department on several occasions.

Julie also told Peters in June 2005 that the decree did not contain the correct legal language in order to allow disbursement of the second payment. As time passed, Peters continued to assure Julie that he was working to resolve the issue. The second payment from the TSP account was not processed until November 8, 2006.

Peters said that after Julie contacted him about the second payment, he advised her that she was not entitled to additional moneys from Kerry's retirement plan until he retired and that the date of his retirement would be determined in the future. Peters told the Counsel for Discipline that he believed Julie was going to follow up on the TSP account herself.

The formal charges alleged that between January 2005 and May 2006, Kerry and Julie repeatedly contacted Peters to ask him to take the necessary steps to correct the problem with the decree. Julie filed a grievance against Peters with the Counsel for Discipline on June 8, 2006, alleging that Peters had neglected to complete the representation for which he had been paid and had failed to take the necessary steps to correct the decree so the TSP account could be disbursed. Peters did not respond when he received a copy of the grievance letter, and the Counsel for Discipline sent a second letter on July 12. Peters responded on July 21, but he did not address the TSP account issue.

Kerry, who was unaware that Julie had filed a grievance, contacted Peters on July 25, 2006, to ask again about completing the necessary steps to get the TSP account released to Julie. Peters drafted a stipulation and a proposed order, which Kerry signed. An amended order intended to comply with TSP requirements was signed by the court on September 15. On September 29, TSP administrators directed payment of the balance of the account to Julie.

The formal charges included an allegation that Peters violated the following provision of Canon 6 of the Code of Professional Responsibility for his actions prior to September 1, 2005: "DR 6-101 Failing to Act Competently. (A) A lawyer shall not: . . . (3) Neglect a legal matter entrusted to him or her."

For acts and omissions occurring after September 1, 2005, the formal charges included that Peters violated his oath of office as an attorney and the following provisions of Neb. Ct. R. of Prof. Cond. as now codified: "§ 3-501.3. Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client" and "§ 3-501.4. Communications. (a) A lawyer shall: . . . (3) keep the client reasonably informed about the status of the matter; [and] (4) promptly comply with reasonable requests for information."

2. Judith R. Herman

The formal charges in case No. S-07-960 relate to Peters' representation of Judith R. Herman in several cases.

(a) Probate of Estate

The first count arose from Herman's request in 1999 that Peters initiate estate proceedings for her parents, who died in July and August 1999. Between 1999 and May 2006, Peters failed to open estate proceedings for Herman's parents and failed to effectuate the transfer of property in Kimball, Nebraska, to Herman. Herman terminated Peters' representation in May 2006 after retaining a second attorney. The formal charges also allege that Herman gave Peters her parents' wills and that he failed to return them to her.

The formal charges for count I included that Peters violated DR 6-101(A)(3) of the Code of Professional Responsibility and also that Peters violated §§ 3-501.3 and 3-501.4(a)(3) and (4). In addition, Peters allegedly violated Neb. Ct. R. of Prof. Cond. §§ 3-501.15(a) and (d) and 3-501.16(d), which require a lawyer to hold a client's property separately from the lawyer's property and to return the same upon termination of representation.

(b) Kinder Morgan, Inc.

In count II, the formal charges allege that Peters failed to properly pursue a legal action related to a residential rental property in Scottsbluff, Nebraska, owned by Herman. As to this count, the formal charges included that Peters violated DR 6-101(A)(3) of the Code of Professional Responsibility and §§ 3-501.3 and 3-501.4(a)(3) and (4).

The property at issue was vacant in February 2003, when Kinder Morgan, Inc., a natural gas utility company, wrongfully terminated gas service. As a result, a water pipe burst, causing water damage to the residence. The residence was sold in February 2004 prior to any repair of the water damage. Herman hired Peters to file suit against Kinder Morgan for damages. Peters drafted a complaint and filed it on December 10. Peters allegedly failed to respond to contacts from an attorney for Kinder Morgan seeking an early resolution of the matter. In addition, Peters allegedly failed to provide the attorney with documentation to support the alleged damages and failed to send copies of communications from the attorney to Herman. Peters also allegedly failed to adequately respond

to requests for production of documents, failed to inform Herman of the requests, and misplaced additional documentation Herman provided to support her claim for lost rent due to damage to the residence.

Peters took no action on the case after October 4, 2005. Herman sent Peters a letter on May 25, 2006, informing him that she was terminating his representation of her. She settled her claim against Kinder Morgan on September 13, and the case was dismissed on October 5.

(c) Past-Due Child Support

The third count in the formal charges related to the recovery of past-due child support for Herman. The referee found no ethical violations related to the child support claim, and the Counsel for Discipline has not appealed that finding. Both parties agree it is no longer at issue.

3. Referee's Findings: Julie

After a hearing, the referee submitted a report and recommendation, including findings of fact. Regarding the grievance filed by Julie, the referee found that the primary asset to be divided in the divorce was a TSP account worth approximately $40,000. Kerry and Julie both contacted Peters to tell him that the TSP legal department said the divorce decree did not contain the requisite language for issuance of the second payment. Kerry had followup contacts with Peters by fax, telephone, and e-mail regarding the TSP account payment.

Peters did not respond to a letter from the Counsel for Discipline sent in June 2006, after Julie had filed her grievance. The Counsel for Discipline sent a second letter on July 12, and Peters submitted a response on July 21, in which he stated that he had told Julie the money was not available to her until Kerry retired. Peters said he believed that Julie planned to follow up on her own.

On July 25, 2006, Peters drafted and obtained Kerry's signature on a stipulation and agreement to be filed with the district court to remedy the issues with the TSP account. The court entered a "Retirement Benefits Court Order" on July 26. The

order directed that the remaining portion of the TSP account, in the amount of $20,241.98, be paid to Julie.

The referee found that Peters was aware of the issues regarding the second TSP account payment prior to his July 21, 2006, response to the Counsel for Discipline and that Peters simply failed to follow through by taking any action on the requests of Kerry and Julie. The referee found by clear and convincing evidence that Peters violated DR 6-101 and § 3-501.3 by failing to act competently and with reasonable diligence and promptness in responding to inquiries by Kerry and Julie to address the legal issues concerning the second TSP account payment. The referee found that Peters' "benign neglect" was not done with an intent to prejudice or damage his client.

4. Referee's Findings: Herman

(a) Probate of Estate

In the first count related to Herman, the referee found that Peters took no action to open estate proceedings or to transfer the real property between 1999 and May 2006, when his representation was terminated. Peters testified he did not initiate the estate proceedings and transfer the real property because he had not received any money from Herman to pay for the costs and fees to handle the matter. Peters claimed he told Herman that he would need "a few hundred dollars" to open the estate. However, in Peters' initial response to a letter from the Counsel for Discipline, Peters stated that some of the matters he handled for Herman had been set aside in favor of more pressing problems, with Herman's knowledge and consent.

The referee found it "distressing" that Peters did not mention the failure to be paid as a defense in his January 25, 2007, letter responding to the Counsel for Discipline. Peters offered no evidence concerning a fee agreement or to show that Herman consented to setting the estate matter aside while other matters were addressed. Peters testified that he never sent any correspondence to Herman about the estate matter.

The referee found by clear and convincing evidence that Peters violated DR 6-101 and § 3-501.3 by failing to act competently and with reasonable diligence and promptness in opening an estate for Herman's parents and transferring the real property to Herman. He also found by clear and convincing evidence that Peters violated § 3-501.4 by failing to keep Herman reasonably informed about the status of the estate matter. The referee did not find that Peters violated §§ 3-501.15 and 3-501.16 by failing to properly hold the original wills. Herman conceded at the hearing before the referee that the original wills could have been misplaced while they were in her possession. Therefore, it was not sufficiently clear if and when Peters would have had the responsibility to hold the wills for Herman's benefit.

(b) Kinder Morgan

The second count involved a lawsuit filed by Herman against Kinder Morgan. The complaint alleged that Herman had sustained $10,000 in damages to the property and $1,875 in damages for lost rents. Herman testified that Peters did not send her a copy of the letter from Kinder Morgan's counsel seeking resolution of the matter or inform her of Kinder Morgan's offer to discuss a settlement. Peters claimed he sent a copy of the letter, but he acknowledged that he had no records to corroborate the claim.

Nor did Peters provide Herman with copies of the requests for production of documents or letters from Kinder Morgan's counsel. Peters admitted at the hearing before the referee that he did not respond to Kinder Morgan's second request for documents. Peters provided Kinder Morgan with a repair estimate for the water damage, which was the only documentation related to the discovery requests. Kinder Morgan replied that Peters' response was inadequate and not responsive to the discovery requests. On May 25, 2006, Herman sent Peters a letter terminating his representation of all her legal matters and informing him that she had retained another attorney to handle her claim against Kinder Morgan.

The referee found that Peters provided scant evidence that he kept Herman reasonably informed of the status of her action

against Kinder Morgan. While Peters testified that he forwarded the discovery requests and the motion to compel, Herman disputed these contentions. Peters also admitted that there were no cover letters for delivery of the documents to Herman to corroborate his testimony. Peters testified that he communicated to Herman through telephone conversations. The referee said that Peters' testimony lacked credibility, because he repeatedly acknowledged that he failed to provide telephone records evidencing any calls to Herman. In addition, the referee found that contrary to Peters' prior assertions in his deposition, there were no entries on his day planner or in his billing records to substantiate any telephone calls to Herman.

The referee found by clear and convincing evidence that Peters violated § 3-501.4 by failing to keep Herman reasonably informed about the status of the matter. It was clear that Peters had difficulty producing the documents requested in Kinder Morgan's discovery requests, but he failed to take proper action to respond to the requests. The referee also found by clear and convincing evidence that Peters violated DR 6-101 and § 3-501.3 by failing to act competently and with due diligence.

5. Referee's Recommendations as to Sanction

The referee noted that Peters had previously received a private reprimand on April 18, 2002, for violating Canon 1, DR 1-102(A)(1), (4), and (5), and DR 6-101(A)(2) and (3), based on charges that he neglected a legal matter entrusted to him. On January 14, 2005, for violating DR 1-102(A)(1) and (5) and DR 6-101(A)(2), Peters received a public reprimand, was placed on probation for 1 year, was restricted from taking bankruptcy cases, and was ordered to complete 15 hours of continuing legal education in the area of bankruptcy law. The sanctions were based on charges that he neglected a bankruptcy action.

The referee noted that Peters presented several mitigating factors. He offered into evidence his involvement in community and volunteer projects. However, the referee found that Peters' community service did not deserve "a lot of merit" in these cases. Peters was advised to consider whether his

extensive community service might deserve some of the blame for his failure to diligently represent his clients.

The referee recommended that Peters be suspended from the practice of law for 60 days, that a public reprimand be issued, and that upon reinstatement, Peters be ordered to work with a practice monitor for 1 year at his own cost.

III. ASSIGNMENTS OF ERROR

The Counsel for Discipline filed exceptions to the referee's report, asserting that the recommended sanction was too lenient. Peters also filed exceptions, arguing that the referee (1) failed to apply the clear and convincing evidence standard of review regarding findings that ethical violations were committed, (2) placed burdens of proof on Peters and failed to require the Counsel for Discipline to carry its burden of proof, and (3) erred in finding that the testimony of the complainants constituted credible evidence on which to base findings of ethical violations.

IV. STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[1] In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings. When credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[2]

V. ANALYSIS

1. Julie's Grievance

The formal charges in case No. S-07-517 allege that Peters failed to act diligently and competently in obtaining an order to allow Kerry's TSP account to be liquidated and distributed to Julie as agreed to by the parties. It was not until almost 2

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[1] *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

[2] *State ex rel. Counsel for Dis. v. Scott*, 275 Neb. 194, 745 N.W.2d 585 (2008).

years after the property settlement agreement was prepared that an order was signed by the district court directing distribution of the TSP account as provided in a stipulation filed on July 25, 2006.

Peters argues that the "key determination" related to disbursement of the TSP account is whether Julie ever asked him to resolve the incomplete transfer of the funds.[3] He asserts that there is no physical evidence to support her claim, and he attacks Julie's credibility. Peters argues that Kerry was never Peters' client and that Kerry also is not credible.

[3,4] Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[4] Clear and convincing evidence means more than a preponderance but less than evidence beyond a reasonable doubt.[5] The record supports the referee's findings by clear and convincing evidence that Peters violated DR 6-101 and § 3-501.3 by failing to act competently and with reasonable diligence and promptness in responding to Julie's questions about the second payment from the TSP account. The referee found that Peters' "benign neglect" did not show an intent to prejudice or damage his client.

While this court conducts a de novo review and reaches a conclusion independent of the referee's findings, we give weight to the fact that the referee heard and observed the witnesses. Peters' core defense is that the complainants are not credible. The record supports a finding by clear and convincing evidence that Peters did not diligently and promptly investigate the delay in the second payment, which was not made until 22 months after the entry of the decree.

2. Herman's Grievance

The formal charges in case No. S-07-960 were related to probate of the estate of Herman's parents and a civil suit against Kinder Morgan.

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[3] See brief for respondent at 34.

[4] *State ex rel. NSBA v. Roubicek*, 225 Neb. 509, 406 N.W.2d 644 (1987).

[5] *Id.*

Peters' defense was that Herman was not credible. He claimed that he had not concluded some of the matters Herman had requested of him because those matters were set aside in favor of more pressing problems, with Herman's knowledge and consent.

Peters testified that he did not open an estate for Herman's parents, because she refused or declined to provide any funds. He told Herman he would need "a few hundred dollars" to cover filing fees, publication, and legal fees, but he did not send Herman a letter asking for the money, nor did he have any notes in his file to indicate that he had discussed the fee request. He did not recall sending any correspondence to Herman regarding the estate.

The record supports the referee's findings by clear and convincing evidence that Peters violated DR 6-101 and § 3-501.3 by failing to act competently and with reasonable diligence and promptness in opening the estate of Herman's parents and transferring the real property to her.

The referee also found by clear and convincing evidence that Peters violated § 3-501.4 by failing to keep Herman reasonably informed about the status of the estate. We agree. The referee found that Peters did not violate §§ 3-501.15 and 3-501.16 by failing to properly hold the original wills of Herman's parents. We agree. Herman conceded at the hearing that the original wills could have been misplaced while they were in her possession.

Count II of the formal charges relates to the civil lawsuit against Kinder Morgan. Peters filed the suit on December 10, 2004, seeking judgment of $11,875. On January 19, 2005, Kinder Morgan's attorney sent a fax stating that the company wished to discuss an early resolution of the matter. Peters failed to respond to several messages about the matter and failed to respond to Kinder Morgan's requests for production of documents over a period of more than 1 year. Herman eventually terminated her attorney-client relationship with Peters.

Peters blamed the lack of communication on Herman, stating that he tried to return her calls, but that she was not home. He could not corroborate his testimony that he had provided Herman with copies of documents. Nor did he have records

to support his claim that he communicated with Herman by telephone. Peters had no notations on his day planner to indicate any telephone calls to Herman, Kinder Morgan, or cocounsel.

The record supports the referee's finding by clear and convincing evidence that Peters violated § 3-501.4 by failing to keep Herman reasonably informed about the status of the lawsuit against Kinder Morgan and that Peters violated DR 6-101 and § 3-501.3 by failing to act competently and with due diligence.

3. Resolution

A proceeding to discipline an attorney is a trial de novo on the record.[6] In attorney discipline and admission cases, this court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings. However, when credible evidence is in conflict on material issues of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[7]

We reject Peters' attack on the credibility of his clients. In *State ex rel. NSBA v. Kirshen*,[8] this court stated:

> A lawyer, with the great responsibilities that that position requires, should not disparage his clients or those for whose benefit he is purportedly acting, and hide behind their alleged faults to excuse his own ineptitude. Not only is such an approach unmannerly and unseemly, it is not recognized as a defense to disciplinary matters. If a lawyer accepts a case, that case must be handled professionally. If, due to personal relationship problems, the lawyer cannot handle his responsibility, the lawyer must withdraw and turn the matter over to a lawyer who has the competence and integrity to conclude the legal matter properly.

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[6] *State ex rel. Counsel for Dis. v. Switzer*, *supra* note 1.

[7] *State ex rel. Counsel for Dis. v. Scott*, *supra* note 2.

[8] *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 474, 441 N.W.2d 161, 178 (1989).

[5] We are presented with formal charges based on complaints from two clients involving several different events. This court has held that cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[9]

Peters has previously been disciplined by this court. In 2002, he received a private reprimand. In January 2005, Peters was publicly reprimanded after entering into a conditional admission that he violated DR 1-102(A)(1) (violate disciplinary rule), DR 1-102(A)(5) (engage in conduct that is prejudicial to administration of justice), and DR 6-101(A)(2) (handle legal matter without preparation adequate in circumstances).[10] As part of the discipline, we ordered that Peters be placed on probation for 1 year, during which he was not to accept any bankruptcy cases, and he was required to complete 15 hours of continuing legal education in the area of bankruptcy law.

In the present case, the referee found it troubling that this is the third time Peters has been found guilty of neglect and failure to act with reasonable diligence. We agree. In fact, Peters was on disciplinary probation during the period that he was representing Julie and Herman. Yet, he failed to keep his clients informed of the status of their cases or to diligently pursue their cases.

The referee reviewed mitigating factors presented by Peters, which included a record of his community involvement. However, the referee noted that the community service might have contributed to Peters' failure to diligently represent his clients.

[6] The referee recommended that Peters be suspended for 60 days. The Counsel for Discipline requests a suspension of 1 year. In evaluating attorney discipline cases, this court considers aggravating and mitigating circumstances, the attorney's conduct underlying the charges and throughout the proceeding,

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[9] *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008), citing *State ex rel. Counsel for Dis. v. Sipple*, 265 Neb. 890, 660 N.W.2d 502 (2003).

[10] See *State ex rel. Counsel for Dis. v. Peters*, 269 Neb. 162, 690 N.W.2d 629 (2005), *modified* 269 Neb. 577, 694 N.W.2d 203.

and the propriety of a sanction with the sanctions imposed in similar cases.[11]

The Counsel for Discipline points to *State ex rel. Counsel for Dis. v. Wadman*[12] as a case similar to the one at bar. There, the attorney failed to attend a hearing on a summary judgment motion and the client's case was dismissed. The attorney did not inform the client of the dismissal. In a second case, the attorney neglected the matter and did not file the action within the time allowed by the statute of limitations. The attorney had been the subject of two prior disciplinary proceedings generally involving the neglect of three separate clients' matters while he was in private practice. He had been a practicing attorney for only 4 years at the time he closed his private practice and went to work as an in-house counsel. We suspended the attorney from the practice of law for 6 months.

Peters is an experienced lawyer who has been in private practice since 1973. In the case of Julie, Peters failed to use the correct wording in the divorce decree to effectuate the disbursement of the TSP account. When the problem was brought to his attention, he failed to take the necessary steps to resolve it. According to Julie, she and her ex-husband, Kerry, repeatedly contacted Peters and he still took no action. After a grievance was filed against Peters, he prepared an order that resolved the issue.

As for the matters presented by Herman, Peters failed to open estate proceedings, even after 6 years had passed, and he failed to keep Herman informed about the activities occurring in the Kinder Morgan case. A second attorney resolved the matter within months after Peters was discharged.

[7] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[13] For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying

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[11] See *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008).

[12] *State ex rel. Counsel for Dis. v. Wadman*, *supra* note 9.

[13] *State ex rel. Counsel for Dis. v. Davis*, 276 Neb. 158, 760 N.W.2d 928 (2008).

the events of the case and throughout the proceeding.[14] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[15] The only mitigating factor presented by Peters is his community involvement.

Taking into consideration that Peters has previously been reprimanded privately and publicly for similar actions, we believe a suspension of 60 days is too lenient. We therefore impose a 6-month period of suspension.

VI. CONCLUSION

We find by clear and convincing evidence that Peters violated DR 6-101(A)(3) and § 3-501.3 with respect to Julie, DR 6-101(A)(3) and §§ 3-501.3 and 3-501.4(a)(3) and (4) with respect to the estate of Herman's parents, and DR 6-101(A)(3) and §§ 3-501.3 and 3-501.4(a)(3) and (4) with respect to Herman's case against Kinder Morgan. It is the judgment of this court that Peters be suspended from the practice of law for a period of 6 months, effective immediately.

Peters shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Upon reinstatement, Peters shall engage an attorney to monitor his practice for a period of 1 year. Peters shall pay all costs associated with this monitoring. Furthermore, Peters is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

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[14] *Id.*

[15] *Id.*

DOROTHY M. LOVES, APPELLANT, V. WORLD INSURANCE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

773 N.W.2d 348

Filed March 13, 2009. No. S-07-1067.

SUPPLEMENTAL OPINION

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

Steven J. Riekes and Howard N. Epstein, of Marks, Clare & Richards, L.L.C., for appellant.

Mary Kay O'Connor and Pamela Epp Olsen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Case No. S-07-1067 is before this court on the motion for rehearing of appellant Dorothy M. Loves regarding our opinion reported at *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008). We overrule the motion but for purposes of clarification modify the opinion as follows:

In the portion of the opinion designated "ANALYSIS," we withdraw the first through the third paragraphs, *id.* at 939-41, 758 N.W.2d at 643-44, and substitute the following paragraphs in their place:

> The NWPCA requires an employer to pay "unpaid wages" to an employee who separates from the payroll "on the next regular payday or within two weeks of the date of termination, whichever is sooner."[8] A sick leave plan is considered a fringe benefit under the NWPCA. At the time Loves retired from World, in 2003, the NWPCA defined "wages" as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been

[8] § 48-1230.

met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis."[9] The NWPCA was subsequently amended to include the following provision: "Paid leave, other than earned but unused vacation leave, provided as a fringe benefit by the employer shall not be included in the wages due and payable at the time of separation, unless the employer and the employee or the employer and the collective-bargaining representative have specifically agreed otherwise."[10] This amended language was in effect at the time of the district court's disposition of the case in 2007.

When applying § 48-1229, we have consistently held that a payment will be considered a wage subject to the NWPCA if (1) it is compensation for labor or services, (2) it was previously agreed to, and (3) all the conditions stipulated have been met.[11]

[5] In the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[12] Under the plain language of either § 48-1229(4) (Reissue 2004) or § 48-1229(4) (Cum. Supp. 2008), no fringe benefit, including sick leave, is payable to a separating employee unless it was previously agreed to and all the conditions stipulated have been met.

Unlike the employee handbook in *Professional Bus. Servs. v. Rosno*,[13] which provided, "'Any sick leave not used will be paid to the employee at the time of termination,'" it is undisputed in this case that at the time

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[9] § 48-1229(4) (Reissue 2004).

[10] § 48-1229(4) (Cum. Supp. 2008).

[11] *Pick v. Norfolk Anesthesia, ante* p. 511, 755 N.W.2d 382 (2008); *Roseland v. Strategic Staff Mgmt., supra* note 2; *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997); *Knutson v. Snyder Industries, Inc.*, 231 Neb. 374, 436 N.W.2d 496 (1989).

[12] *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[13] *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 115, 680 N.W.2d 176, 188 (2004).

of Loves' retirement, the World policy did not permit employees to cash out their earned but unused sick leave. When Loves retired, World's employee handbook provided that sick leave could be used "for employee illness or that of a dependent child" and that "[u]nused sick time cannot be carried over but will be placed in an emergency reserve account to be used for extended periods of illnesses, greater than 3 days, or disability." It also provided that "[u]nused personal and sick time can not be cashed in at time of termination. Any unused balance will be forfeited."

[6] Under either version of § 48-1229(4), the one in effect at the time of Loves' retirement or the one in effect at the time of the district court's disposition, accrued but unused sick leave may be treated differently than accrued but unused vacation leave for purposes of determining unpaid wages when employment ends, because the stipulated conditions for each type of leave may differ. Other courts have recognized an employer's right to treat sick leave as a "contingent benefit due only in the event an employee misses work due to illness."[14] We conclude that the NWPCA does not prohibit an employer from providing a sick leave benefit which may be used only in the event of illness or injury and which has no monetary value upon termination of employment if it is not so used. In this case, the agreement of the parties at the time of Loves' retirement, as reflected in the employee handbook, contemplated a benefit of this nature. Loves did not contend that she was entitled to the value of sick leave based on a qualifying illness or injury, and she did not present any medical evidence to that effect.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

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[14] *Teamsters, Local 117 v. NW Beverages*, 95 Wash. App. 767, 768, 976 P.2d 1262, 1263 (1999). See, also, *Simpson v. City of Blanchard*, 797 P.2d 346 (Okla. App. 1990).

IN RE INTEREST OF J.R., ALLEGED TO BE A DANGEROUS SEX OFFENDER. J.R., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

762 N.W.2d 305

Filed March 13, 2009. No. S-07-1300.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Legislature: Intent.** All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.
4. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
5. **Judgments: Appeal and Error.** In reviewing a district court's judgment, appellate courts will affirm the district court's judgment unless the appellate court finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.
6. **Convicted Sex Offender.** The purpose of the Sex Offender Commitment Act is to provide for the court-ordered treatment of sex offenders who have completed their sentences but continue to pose a threat of harm to others.
7. **Mental Health: Convicted Sex Offender.** The Sex Offender Commitment Act provides a separate legal standard for sex offenders, which allows dangerous sex offenders to meet the standards of a mentally ill, dangerous sex offender who would not meet the traditional standards of mentally ill and dangerous under the Nebraska Mental Health Commitment Act.
8. **Convicted Sex Offender.** The civil commitment procedures of the Sex Offender Commitment Act apply to presently confined persons who have been convicted of one or more sex offenses and are scheduled for release.
9. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
10. **Statutes: Constitutional Law: Sentences.** Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
11. **Criminal Law: Other Acts: Time.** Only retroactive criminal punishment for past acts is prohibited, and civil disabilities and sanctions may apply

retroactively without violating the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions.

12. **Constitutional Law: Statutes: Sentences: Time: Intent.** Whether a statute violates state and federal constitutional protections against retroactive punishment is analyzed under the U.S. Supreme Court's two-prong "intent-effects" test for analyzing punishment.
13. **Convicted Sex Offender: Constitutional Law: Statutes: Legislature: Intent: Proof.** Under the "intent-effects" test, a court first determines whether the Legislature intended a statutory scheme to be civil. If so, that intent will be rejected only where the challenger provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.
14. **Statutes: Legislature: Intent.** In analyzing whether the purpose or effect of a statute is so punitive as to negate the Legislature's intent, a court considers the following factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.
15. **Criminal Law: Statutes: Legislature: Intent: Appeal and Error.** Whether the Legislature intended a statutory scheme to be civil or criminal is primarily a matter of statutory construction. However, an appellate court must also look at the statute's structure and design.
16. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
17. ____: ____. The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
18. **Constitutional Law: Statutes.** It is a long-standing rule that a person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations not before court.
19. **Constitutional Law: Equal Protection: Statutes: Presumptions: Proof.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.
20. **Constitutional Law: Equal Protection.** The Equal Protection Clause under § 1 of the 14th Amendment does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.

21. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim. In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.
22. **Equal Protection: Statutes.** In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification may be dispositive.
23. **Constitutional Law: Statutes.** Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.
24. **Constitutional Law: Statutes: Legislature: Intent.** Under rational basis review, an appellate court will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose. In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.
25. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
26. **Criminal Law: Mental Health: Convicted Sex Offender.** Mentally ill sex offenders are different from mentally ill persons who are not sex offenders due to the sexual nature of their crimes.
27. **Convicted Sex Offender: Proof.** In order for a person to be considered a dangerous sex offender, the State must prove by clear and convincing evidence that the person is likely to engage in repeat acts of sexual violence and that he or she is substantially unable to control his or her criminal behavior.
28. **Criminal Law: Mental Health.** The key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others.
29. **Mental Health: Due Process: Proof.** To comply with due process, there must be a finding that there is a substantial likelihood that a person will engage in dangerous behavior unless restraints are applied.
30. **Criminal Law: Mental Health.** In determining whether a person is dangerous, the focus must be on the person's condition at the time of the commitment hearing.
31. **Mental Health: Other Acts: Proof.** The actions and statements of the person prior to the commitment hearing are probative of the person's present mental condition. But, for a past act to have evidentiary value, the past act must have some foundation for a prediction of future dangerousness, thus being probative of that issue.
32. **Trial: Evidence: Appeal and Error.** An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court's judgment as to credibility.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Sean M. Conway for appellant.

Jeffrey J. Lux, Deputy Douglas County Attorney, and Michael W. Jensen for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

J.R. challenges the constitutionality of the Sex Offender Commitment Act (SOCA)[1] as a violation of equal protection and double jeopardy, and as an impermissible ex post facto law under the U.S. Constitution and the Nebraska Constitution. J.R. also challenges the sufficiency of the evidence supporting the decisions of the Mental Health Board of the Fourth Judicial District (the Board) and the district court adjudging him to be a dangerous sex offender in need of involuntary, inpatient treatment under SOCA.

II. BACKGROUND

On October 3, 2000, J.R. was convicted of first degree sexual assault on a child for sexually assaulting his girlfriend's daughter. The sexual assaults occurred over a period of years, starting when the child was in the second grade. The assaults continued until the seventh grade and progressed from fondling to sexual intercourse. Two months before being charged, J.R. sought psychotherapy because he "knew that he had a problem." But J.R. was unable to complete his recommended treatment before being sentenced to 10 to 12 years' imprisonment for the assaults.

While in prison, J.R. participated in an inpatient sex-offender program from May 2001 to December 2002. J.R. did not complete this treatment, however, because he was terminated from

[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Cum. Supp. 2008).

the program for unsatisfactory progress and an unrelated laundry violation. J.R. did complete other behavior management groups while in prison.

J.R. was scheduled for discharge from prison on December 12, 2006. On November 6, the deputy county attorney (the State) filed a petition with the Board seeking to have J.R. adjudged to be a dangerous sex offender as defined by Neb. Rev. Stat. § 83-174.01(1)(a) (Cum. Supp. 2008) and, accordingly, to have him placed in the custody of the Department of Health and Human Services for further treatment.

The Board held a hearing on January 9, 2007. The Board found by clear and convincing evidence that J.R. was a mentally ill, dangerous sex offender likely to reoffend and that inpatient treatment through the Department of Health and Human Services was the least restrictive treatment plan.

At the hearing, the State entered into evidence testimony from Dr. Stephen Skulsky, a licensed and certified clinical psychologist who evaluated J.R. on November 20, 2006. As part of J.R.'s evaluation, Skulsky obtained information about J.R.'s history. Specifically, he reviewed a letter from the Douglas County Attorney's office summarizing J.R.'s situation and an incident report regarding the sexual abuse. Skulsky also reviewed a letter from Dr. Mark Weilage, a clinical psychologist at the Department of Correctional Services.

Weilage evaluated J.R. in 2006. His letter contained the results of a "Static-99" measure, a test customarily used in commitment proceedings to assist clinicians in forming an opinion as to the level of risk that an offender will reoffend. J.R. scored a zero, the lowest score on the Static-99 measure, demonstrating a low risk for reoffending. Weilage opined, however, that the Static-99 measure may underestimate J.R.'s risk for reoffending. Weilage further noted that the treatment staff still had concerns about J.R.'s unmet treatment needs. Nevertheless, it was Weilage's opinion that there was insufficient evidence in J.R.'s file to indicate that he would meet the criteria of a dangerous sex offender.

J.R. asserted that previous evaluations had been conducted, but such evaluations were not included in the record. Skulsky did not consider these other evaluations because he was not

aware of them. Skulsky indicated that he had also evaluated J.R. in 2000, but that he did not use that evaluation because of an issue regarding payment. Skulsky's previous evaluation was also not introduced into evidence.

In addition to the documents already listed, Skulsky conducted an in-person evaluation of J.R. and administered various personality tests, including the "Minnesota Multi-Phasic Personality Inventory-Form 2"; the Rorschach, or inkblot, test; the "Thematic Apperception" test; projective drawings; and an "Incomplete Sentences Blank." Skulsky noted that J.R.'s history included emotional, physical, and sexual abuse by his stepfather, substance abuse, and inappropriate sexual behaviors for which he was incarcerated. J.R. and Skulsky also discussed the 18 months of sex offender treatment J.R. received in prison. Skulsky testified that J.R. wanted treatment and that J.R. was disappointed that he did not have the opportunity to complete treatment while in prison. J.R. indicated he was willing to obtain treatment after being released from prison.

According to Skulsky, the test results revealed that J.R. is egocentric and irresponsible. The tests also revealed that J.R. is an "arousal seeker" and has problems controlling his emotions and his sexual urges. Skulsky diagnosed J.R., to a reasonable degree of psychological certainty, with (1) dysthymic disorder, (2) personality disorder "NOS," (3) cannabis or marijuana dependence, and (4) pedophilia. Skulsky explained that despite the fact that J.R. had a "good understanding of what had happened," J.R. was still a pedophile. Skulsky testified that without successfully completing treatment, J.R. would have a hard time clearly perceiving things and would be likely to recidivate.

Skulsky recommended 6 months of involuntary, inpatient treatment to finish the sex offender program. Skulsky concluded that this was the least restrictive treatment alternative "[b]ecause of the possible negative outcome given the dangerousness of his likely repeating the offense, it's too great a risk to run for the safety of society based on my professional opinion. That's why, the fact that he's still dangerous."

Based on this evidence, the Board found J.R. to be a dangerous sex offender under § 83-174.01(1)(a) and committed

him to secure inpatient treatment. The district court affirmed. We granted J.R.'s petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

J.R. asserts, renumbered and restated, three assignments of error. First, J.R. asserts that SOCA is unconstitutional under the U.S. Constitution and the Nebraska Constitution, because (1) it constitutes an impermissible ex post facto law, (2) it violates double jeopardy, and (3) it violates equal protection. Second, J.R. asserts that the Board erred in finding that J.R. is a dangerous sex offender. Third, J.R. asserts that the Board erred in finding that neither voluntary hospitalization nor other treatment alternatives less restrictive were available as required by § 71-1209.

IV. STANDARD OF REVIEW

[1-3] Whether a statute is constitutional is a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.[2] A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.[3] All reasonable intendments must be indulged to support the constitutionality of legislative acts, including classifications adopted by the Legislature.[4]

[4,5] The district court reviews the determination of a mental health board de novo on the record.[5] In reviewing a district court's judgment, we will affirm the judgment unless we find, as a matter of law, that the judgment is not supported by clear and convincing evidence.[6]

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[2] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[3] *Id.*

[4] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

[5] *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

[6] See, *In re Interest of Michael U.*, 273 Neb. 198, 728 N.W.2d 116 (2007); *In re Interest of Kochner, supra* note 5.

V. ANALYSIS

This is the first time we have considered constitutional challenges under SOCA. As such, we begin our analysis with a brief overview of SOCA.

[6,7] In 2006, the Nebraska Legislature enacted SOCA.[7] The purpose of SOCA "is to provide for the court-ordered treatment of sex offenders who have completed their sentences but continue to pose a threat of harm to others."[8] SOCA provides a separate legal standard for sex offenders, which allows dangerous sex offenders to meet the standards of a mentally ill, dangerous sex offender who would not meet the traditional standards of mentally ill and dangerous under the Nebraska Mental Health Commitment Act (MHCA).[9]

[8] Section 71-1203 provides that the definition of a dangerous sex offender under SOCA is found in § 83-174.01. A dangerous sex offender is

> (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.[10]

In other words, the civil commitment procedures of SOCA apply to presently confined persons who, like J.R., have been convicted of one or more sex offenses and are scheduled for release.

Under SOCA, the Board must hold a hearing to determine whether there is clear and convincing evidence that the subject

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[7] §§ 71-1201 through 71-1226.

[8] § 71-1202.

[9] Committee Statement, L.B. 1199, Judiciary Committee, 99th Leg., 2d Sess. (Feb. 16, 2006). See Neb. Rev. Stat. §§ 71-901 to 71-962 (Reissue 2003 & Cum. Supp. 2008).

[10] § 83-174.01(1).

is a dangerous sex offender.[11] But before the hearing, a law enforcement officer who has probable cause to believe the subject is a dangerous sex offender who is likely to reoffend before the Board proceedings may place the subject in emergency protective custody or have the subject continue his or her custody if already in custody.[12] While other "mentally ill and dangerous" persons held in emergency protective custody are held in "an appropriate and available medical facility"[13] if there is probable cause to conclude they are a danger while awaiting the hearing, any mentally ill subject who has a prior conviction for a sex offense, shall be admitted to a jail or correctional facility. A mentally ill subject with a prior conviction for a sex offense will only be held in a medical facility if a "medical or psychiatric emergency exists for which treatment at a medical facility is required" and, in such a case, the subject is to remain in the medical facility only "until the medical or psychiatric emergency has passed and it is safe to transport such person" to the jail or correctional facility.[14] All persons admitted into emergency protective custody must be evaluated within 36 hours after admission by a mental health professional.[15] The subject must then be released pending his or her hearing before the Board unless the mental health professional "determines, in his or her clinical opinion, that such person is mentally ill and dangerous or a dangerous sex offender."[16]

At the hearing, the State must prove by clear and convincing evidence that the subject is a dangerous sex offender and that neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the Board are available or would suffice to prevent the harm described in § 83-174.01(1).[17]

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[11] § 71-1208.

[12] §§ 71-919(1) and 71-921(2).

[13] § 71-919(2)(a).

[14] § 71-919(2)(b).

[15] § 71-919(4).

[16] *Id*.

[17] § 71-1209.

After the hearing by the Board but before the entry of the Board's treatment order, the subject may either be retained in custody until the entry of the order or released from custody under conditions set forth by the Board.[18] If retained in custody, SOCA requires the subject be retained "at an appropriate and available medical facility, jail, or Department of Correctional Services facility."[19]

Once committed, the Board must designate a person to prepare and oversee the confined subject's individualized treatment plan.[20] Such person must submit periodic reports of the confined subject's progress and any modifications to the treatment plan to the Board.[21] If it is determined that the subject is no longer dangerous, immediate release is mandated.[22]

1. Ex Post Facto

We first address J.R.'s argument that SOCA violates the Ex Post Facto Clauses of the U.S. Constitution and the Nebraska Constitution. An ex post facto law disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.[23] Essentially, J.R. argues that SOCA is unconstitutional because it is punitive in nature and retroactive in its application. SOCA had not yet been enacted when J.R. committed his sexual offenses for which he was incarcerated. The State asserts that retroactive application of SOCA does not violate the Ex Post Facto Clauses, because SOCA is not penal in nature and is instead a civil regulatory scheme.

[9-11] Although J.R. challenges SOCA under both constitutional provisions, we will undertake a single analysis, because this court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.[24] Both U.S. Const. art. I, § 10, and Neb.

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[18] § 71-1210.

[19] *Id*.

[20] § 71-1216.

[21] *Id*.

[22] §§ 71-1209 and 71-1219.

[23] *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

[24] *Slansky v. Nebraska State Patrol*, 268 Neb 360, 685 N.W.2d 335 (2004).

Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[25] However, only retroactive criminal punishment for past acts is prohibited.[26] Civil disabilities and sanctions may apply retroactively without violating the Ex Post Facto Clauses.[27] We conclude that SOCA does not violate the Ex Post Facto Clauses.

It should be noted that other courts have held that statutes similar to SOCA that provide for the commitment of dangerous sex offenders preceding or following a criminal conviction do not violate ex post facto or double jeopardy principles.[28] This is because the commitment proceedings for dangerous sex offenders are nonpunitive and civil in nature.[29]

[12-14] Whether SOCA violates state and federal constitutional protections against retroactive punishment is analyzed under the U.S. Supreme Court's two-prong "intent-effects" test for analyzing punishment.[30] Under the intent-effects test, we first determine whether the Legislature intended a statutory scheme to be civil. If so, that intent will be rejected only where the challenger provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.[31] In analyzing whether the purpose or

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[25] *State v. Worm*, *supra* note 2.

[26] *Id.* See *Slansky v. Nebraska State Patrol*, *supra* note 24.

[27] See *State v. Worm*, *supra* note 2.

[28] 57 C.J.S. *Mental Health* § 289 (2007). See, *Seling v. Young*, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001); *In re Detention of Ewoldt*, 634 N.W.2d 622 (Iowa 2001); *In re Allen*, 351 S.C. 153, 568 S.E.2d 354 (2002); *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).

[29] *Id.*

[30] See *State v. Worm*, *supra* note 2. See, also, *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

[31] See *State v. Worm*, *supra* note 2. See, also, *Kansas v. Hendricks*, *supra* note 30.

effect of SOCA is so punitive as to negate the Legislature's intent, we consider the following factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[32]

Recently, in *Kansas v. Hendricks*,[33] the U.S. Supreme Court upheld a sex offender commitment statute very similar to SOCA against both an ex post facto and a double jeopardy challenge. We conclude that the Court's conclusion in *Hendricks* is controlling. Thus, we discuss the Court's reasoning in further detail.

The first question considered by the Court in *Hendricks* was whether the Kansas Legislature intended the Sexually Violent Predator Act (Kansas Act) to impose civil sanctions. If the legislature intended the Kansas Act to impose civil sanctions, the Court "ordinarily defer[s] to the legislature's stated intent."[34] The Court explained:

> Although we recognize that a "civil label is not always dispositive," . . . we will reject the legislature's manifest intent only where a party challenging the statute provides "the clearest proof" that "the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil[.]"[35]

Because the Kansas Act is described as a "'civil commitment procedure,'" and is located in the Kansas probate code instead

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[32] See *State v. Worm*, *supra* note 2. See, also, *Kansas v. Hendricks*, *supra* note 30; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

[33] *Kansas v. Hendricks*, *supra* note 30.

[34] *Id.*, 521 U.S. at 361.

[35] *Id.* (citations omitted).

of the criminal code, the Court concluded that the legislature intended the Kansas Act to be civil in nature.[36]

The Court found that the Kansas Act was intended to be civil in nature. The Court went on to consider whether the defendant provided the clearest proof that the effects of the Kansas Act were so punitive as to negate the legislature's intention.[37] The Court concluded that the defendant failed to meet his burden of proof.[38]

In so concluding, the Court first noted that the Kansas Act did not implicate either retributive or deterrent objectives.[39] Even though the Kansas Act is triggered by the commission of a sexual assault, the Court found the Kansas Act was not retributive "because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness."[40]

Although the Kansas Act is triggered by the commission of a sexual assault, the Kansas Act does not make a criminal conviction a prerequisite for commitment.[41] Rather, the Kansas Act provides that commitment proceedings may be initiated only when a person "has been convicted of or charged with a sexually violent offense," and "suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence."[42] The Court concluded that the absence of necessary criminal responsibility implies that the state was not trying to impose a punishment for past misdeeds.[43] And unlike a criminal statute, the Kansas Act does not require a finding of scienter, but instead requires

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[36] *Id.* (emphasis omitted).

[37] *Kansas v. Hendricks*, *supra* note 30.

[38] *Id.*

[39] *Id.*

[40] *Id.*, 521 U.S. at 362.

[41] See Kan. Stat. Ann. § 59-29a03(a) (2005).

[42] See Kan. Stat. Ann. § 59-29a02(a) (Cum. Supp. 2008).

[43] *Kansas v. Hendricks*, *supra* note 30.

that the commitment determination be based on a "'mental abnormality'" or "'personality disorder'"; thus, the Court concluded that the absence of a finding of scienter provides further evidence that the Kansas Act is not retributive.[44]

In concluding that the Act did not have deterrent objectives, the Court reasoned: "Those persons committed under the [Kansas] Act are, by definition, suffering from a 'mental abnormality' or a 'personality disorder' that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement."[45]

The Court in *Hendricks* acknowledged that the Kansas Act imposed an affirmative disability or restraint, but concluded that an affirmative disability or restraint "'does not inexorably lead to the conclusion that the government has imposed punishment.'"[46] The Court explained:

> The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. . . . The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. . . . If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.[47]

The Court noted that although the Kansas Legislature afforded procedural safeguards similar to those used in a criminal context, the Kansas Act was not thereby transformed into a criminal proceeding.[48] Affording such procedural safeguards demonstrated only that the Kansas Legislature went to great

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[44] *Id.*, 521 U.S. at 362.

[45] *Id.*, 521 U.S. at 362-63.

[46] *Id.*, 521 U.S. at 363.

[47] *Id.* (citations omitted) (emphasis in original).

[48] *Kansas v. Hendricks*, *supra* note 30.

lengths to confine only a small class of particularly dangerous individuals.[49]

The Court found it significant that under the Kansas Act, Hendricks' treatment occurred under the supervision of the Kansas Department of Health and Social and Rehabilitative Services and that he was not housed with the general prison population.[50] Instead, he was segregated from the general prison population operated by individuals not employed by the Department of Correctional Services.

Finally, the Court in *Hendricks* concluded:

> Where the State has "disavowed any punitive intent"; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.[51]

As such, the Court held that the Kansas Act was not punitive.

In the case at bar, J.R. does not dispute that the Legislature intended SOCA to be civil in nature. He also agrees that the Kansas Act considered constitutional by the U.S. Supreme Court in *Hendricks* is similar to SOCA. But J.R. argues that SOCA has two distinguishing differences from the Kansas Act considered in *Hendricks* and that those differences mandate a different conclusion about SOCA's constitutionality. First, J.R. notes that the Kansas Act, unlike SOCA, does not require a prior criminal conviction in order to be adjudged to be a dangerous sex offender. Second, J.R. argues that *Hendricks* is not controlling, because under SOCA, dangerous sex offenders are placed back into the general prison population prior to the hearing before the Board. But under the Kansas Act, sex

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[49] *Id.*

[50] *Id.*

[51] *Id.*, 521 U.S. at 368-69.

offenders awaiting a hearing are segregated from the general prison population. From our own analysis of SOCA, we conclude that such differences are immaterial.

2. Legislative Intent Prong

[15] First, it is clear that the Legislature intended SOCA to be civil in nature. Whether the Legislature intended a statutory scheme to be civil or criminal is primarily a matter of statutory construction.[52] However, we must also look at the statute's structure and design.[53] The explicit purpose of SOCA is to protect the public from sex offenders who continue to pose a threat of harm to others.[54] Further, the Legislature stated in its committee statement that the purpose of SOCA was to create a separate legal standard for sex offenders under MHCA. And when looking at the structure and design, SOCA mirrors the procedures for civil commitments under MHCA, affords the same protections as MHCA, and is located in the civil code. Clearly, the Legislature intended SOCA to be a civil regulatory scheme.

3. Effects of SOCA

Second, J.R. has failed to meet his burden of providing the clearest proof that the effect of SOCA is so punitive in either purpose or effect as to negate the Legislature's intent.[55]

Although civil commitment under SOCA does impose an affirmative restraint, restricting the freedom of dangerous mentally ill persons is a legitimate governmental purpose that has been historically regarded as nonpunitive.[56] Thus, such restraint or affirmative disability may be applied to protect the public. In the case of emergency protective custody pending the hearing before the Board, convicted sex offenders are only held upon a showing of probable cause that custody is necessary and upon a prompt evaluation by a mental health professional

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[52] *State v. Worm*, *supra* note 2.

[53] *Id.*

[54] § 71-1203.

[55] See *State v. Worm*, *supra* note 2.

[56] See *Kansas v. Hendricks*, *supra* note 30.

concluding that the subject is a dangerous sex offender. The fact that SOCA imposes an affirmative disability or restraint does not negate the Legislature's clear intent that SOCA be civil in nature.

Further, the fact that a finding of scienter is not required for civil commitment under SOCA provides evidence that SOCA is indeed a civil regulatory scheme. The determination of whether one is a dangerous sex offender who must be confined is made based on a mental abnormality or personality disorder and not on a finding of criminal intent.

Additionally, we are persuaded that SOCA was not meant to serve as a deterrent. Persons committed under SOCA are suffering from a mental disorder or personality disorder that prevents them from exercising control over their actions. As such, SOCA focuses on treating dangerous sex offenders and not on imposing a punishment. This is further evidenced by the fact that SOCA is modeled after and mirrors MHCA.

Even though SOCA's application is limited to convicted sex offenders, SOCA does not impose liability or punishment for criminal conduct. Instead, like the Kansas Act in *Hendricks*, prior convictions are used for evidentiary purposes. Specifically, requiring that the subject be convicted of a sex offense provides evidence of the subject's mental condition and helps predict future behavior.[57]

Additionally, SOCA is not excessive in relation to its assigned nonpunitive purpose, which is to protect the public and provide treatment to dangerous sex offenders who are likely to reoffend.[58] There is clearly a rational relation between the restriction on dangerous sex offenders' liberty and the statute's purpose of protecting the public by providing treatment for dangerous sex offenders in order to reduce the likelihood they will engage in such acts in the future. Moreover, SOCA not only requires that sex offenders receive a commitment hearing before the Board, but it also imposes a high standard of proof upon the State. To subject a dangerous sex offender to inpatient

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[57] See, *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *State v. Worm*, *supra* note 2.

[58] § 71-1202.

treatment, the State must prove by clear and convincing evidence that involuntary treatment is the least restrictive alternative.[59] Further, SOCA allows for the committed sex offender to request periodic review hearings by the Board to seek from the Board an order of discharge or a change in treatment.[60] These facts provide dispositive proof that SOCA is civil and not criminal in nature.[61] We determine that civil confinement under SOCA is reasonably related to the danger of recidivism and consistent with the regulatory objective, protecting the public from dangerous sex offenders.

Finally, we reject J.R.'s argument that the Kansas Act in *Hendricks* is meaningfully different from SOCA because SOCA, unlike the Kansas Act, requires a prior criminal conviction for a determination that a person is a dangerous sex offender.[62] Under SOCA, persons charged with a sexual offense, but not convicted, do not fall within the definition of a dangerous sex offender. While most statutes do not limit the definition of a dangerous sex offender to only those convicted of a sexual offense, those that do have been held by other courts not to be punitive or unconstitutional.[63] Our Legislature merely limited SOCA's application to a smaller group of sex offenders. A civil commitment is not somehow transformed into a criminal proceeding simply because the Legislature has chosen to limit SOCA's application to those mentally ill persons who have actually been convicted of a sex offense.[64]

J.R.'s second attempt to distinguish SOCA from the Kansas Act found to be constitutional in *Hendricks* is also without merit. Under SOCA, sex offenders must generally remain in jail or a correctional facility while awaiting their hearing from the Board. In contrast, sex offenders awaiting a mental health

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[59] § 71-1209.

[60] § 71-1219.

[61] See, *Kansas v. Hendricks*, *supra* note 30; § 83-174.01.

[62] See § 59-29a03.

[63] *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986); *Woodard v. Mayberg*, 242 F. Supp. 2d 695 (N.D. Cal. 2003); *State v. Carpenter*, *supra* note 28.

[64] See, *Allen v. Illinois*, *supra* note 63; *State v. Carpenter*, *supra* note 28.

hearing under the Kansas Act are placed under the supervision of the Kansas Department of Health and Social Rehabilitative Services. However, J.R. misinterprets the Court's conclusion in *Hendricks*. The Court in *Hendricks* found it significant that the defendant was placed under the supervision of the department *after* the hearing by the Board confirmed that the defendant was a dangerous sex offender.[65] The Court was concerned with the conditions of the confined persons once they are actually civilly committed. The Court did not discuss the conditions of confinement pending the mental health hearing.

We conclude the fact that convicted sex offenders are routinely placed in custody in a jail or correctional facility while awaiting their hearing does not override the Legislature's clear intent that SOCA be civil in nature.

Because J.R. failed to prove that the effects of SOCA are so punitive in either purpose or effect to negate the Legislature's intention, we conclude that SOCA is not punitive and is indeed civil. Therefore, SOCA does not violate the Ex Post Facto Clauses.

4. Double Jeopardy

[16,17] Next, J.R. argues that SOCA is punitive in nature and constitutes multiple punishments for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and article I, § 12, of the Nebraska Constitution. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[66] The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[67]

In *Hendricks*, after finding that the Kansas Act was not punitive, the Court easily rejected the defendant's argument

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[65] *Kansas v. Hendricks*, *supra* note 30.

[66] *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

[67] *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

that the Kansas Act violated the Double Jeopardy Clause.[68] The Court stated that "as commitment under the [Kansas] Act is not tantamount to 'punishment,' [the defendant's] involuntary detention does not violate the Double Jeopardy Clause, even though that confinement may follow a prison term."[69] Having already concluded in our ex post facto analysis that SOCA constitutes a nonpunitive civil regulatory scheme, we similarly conclude that SOCA does not violate the Double Jeopardy Clause, because commitment under SOCA is not punishment.

5. Equal Protection

Next, J.R. argues that because SOCA classifies a dangerous sex offender differently than a mentally ill individual under MHCA, SOCA violates the Equal Protection Clauses found in the 14th Amendment, § 1, to the U.S. Constitution and article I, § 3, of the Nebraska Constitution. Specifically, J.R. maintains that SOCA violates equal protection principles, because it allows a dangerous sex offender to be committed following a diagnosis of a personality disorder. He alleges that this is a lower standard than required for commitment under MHCA, which requires a diagnosis of a mental illness or substance dependence.[70] Section 83-174.01(1)(b) provides that a dangerous sex offender is a person with a personality disorder, who has been convicted of two or more sex offenses, and is substantially unable to control his or her criminal behavior. J.R. does not meet this definition.

[18] J.R. is a sex offender as defined under § 83-174.01(1)(a). He does not meet the definition of a dangerous sex offender under § 83-174.01(1)(b), the subsection he alleges violates equal protection. It is a long-standing rule that a person to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it might conceivably be applied unconstitutionally to others in situations

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[68] *Kansas v. Hendricks*, *supra* note 30.

[69] *Id.*, 521 U.S. at 369.

[70] See § 71-908.

not before court.[71] Because SOCA was constitutionally applied as to J.R., he does not have standing to raise an equal protection argument based on a provision that does not apply to him. Thus, J.R.'s argument is without merit.

J.R. also argues that SOCA violates the Equal Protection Clauses, because it allows dangerous sex offenders to be held in a jail or correctional facility while they await the hearing before the Board—unlike MHCA, which requires that a mentally ill person be placed in an appropriate medical facility.

[19] Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid, and the burden of establishing the unconstitutionality of the statute is on the one attacking its validity.[72]

[20,21] The Equal Protection Clause of the 14th Amendment, § 1, mandates that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[73] This clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.[74] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.[75] In other words, the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.[76]

[22,23] In an equal protection challenge to a statute, the level of judicial scrutiny applied to a particular classification

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[71] See, *State v. Burke*, 225 Neb. 625, 408 N.W.2d 239 (1987); *State v. Greaser*, 207 Neb. 668, 300 N.W.2d 197 (1981); *State v. Brown*, 191 Neb. 61, 213 N.W.2d 712 (1974).

[72] See *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

[73] See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[74] *Id.*

[75] *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003); *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001).

[76] *Kenley v. Neth, supra* note 72.

may be dispositive.[77] Legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.[78]

[24,25] It is undisputed that mental illness is not a suspect class and that neither state courts nor federal courts apply strict scrutiny to challenges similar to J.R.'s.[79] As such, SOCA will be scrutinized using rational basis review. Under this level of scrutiny, we will uphold a classification created by the Legislature where it has a rational means of promoting a legitimate government interest or purpose.[80] In other words, the difference in classification need only bear some relevance to the purpose for which the difference is made.[81] Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[82]

[26] Mentally ill sex offenders are different from mentally ill persons who are not sex offenders due to the sexual nature of their crimes.[83] Sex offenders are generally more dangerous

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[77] *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005).

[78] See *id.*

[79] See *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 568 S.E.2d 338 (2002) (citing *In re Detention of Williams*, 628 N.W.2d 447 (Iowa 2001); *In re Detention of Samuelson*, 189 Ill. 2d 548, 727 N.E.2d 228, 244 Ill. Dec. 929 (2000); *Detention of Turay*, 139 Wash. 2d 379, 986 P.2d 790 (1999); and *Martin v. Reinstein*, 195 Ariz. 293, 987 P.2d 779 (Ariz. App. 1999)).

[80] See *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

[81] See *State v. Simants*, 213 Neb. 638, 330 N.W.2d 910 (1983).

[82] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[83] See, *State v. Little*, 199 Neb. 772, 261 N.W.2d 847 (1978); *Martin v. Reinstein*, *supra* note 79; *Westerheide v. State*, 831 So. 2d 93 (Fla. 2002); *In re Detention of Garren*, 620 N.W.2d 275 (Iowa 2000); *In re Care & Treatment of Hay*, 263 Kan. 822, 953 P.2d 666 (1998); *In re Blodgett*, 510 N.W.2d 910 (Minn. 1994).

to others than are the mentally ill, because of the high probability of recidivism and the unique nature of their crimes. The Legislature has defined a dangerous sex offender as one who is substantially unable to control his or her desire or urge to commit sex offenses.[84] Dangerous sex offenders pose a greater harm to society because of their inability to control their behavior, which invariably results in harm to others. The mentally ill committed under MHCA on the other hand, do not necessarily cause harm to others with their actions.[85] Sex offenders are, therefore, not similarly situated to the mentally ill. As such, statutes that treat them differently do not violate equal protection.[86]

Even assuming that mentally ill sex offenders are similarly situated to mentally ill persons committed under MHCA, this difference in classification is rational.[87] SOCA's purpose is to protect the public from dangerous sex offenders who have demonstrated their dangerous propensities by repeatedly committing sexual offenses. J.R. failed to eliminate any conceivable state of facts that could provide a rational basis for classifying dangerous sex offenders differently from the mentally ill, because allowing dangerous sex offenders who are presently confined to await the Board's hearing in a jail or correctional facility bears a rational relationship to the purpose of SOCA.[88]

A similar argument was rejected by our court in *State v. Little*.[89] In *Little*, the defendant argued that Nebraska's sociopath laws were violative of equal protection because incurably mentally ill, dangerous persons were confined at a regional

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[84] § 83-174.01.

[85] § 71-908(2). See *Martin v. Reinstein, supra* note 79.

[86] See *State v. Little, supra* note 83.

[87] See, *In re Detention of Williams, supra* note 79; *In re Treatment and Care of Luckabaugh, supra* note 79; *In re Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. 2003).

[88] See, *In re Morrow*, 616 N.W.2d 544 (Iowa 2000); *Thompson, petitioner*, 394 Mass. 502, 476 N.E.2d 216 (1985); *Detention of Petersen*, 138 Wash. 2d 70, 980 P.2d 1204 (1999).

[89] *State v. Little, supra* note 83.

center but sexual sociopaths were confined to the Nebraska Penal and Correctional Complex.[90] We concluded that the difference in classification was reasonable and stated: "[T]he public health and safety required that those previously convicted on a sex offense and deemed untreatable may be appropriately held in the Nebraska Penal and Correctional Complex rather than in the regional center due to the fact of the prior conviction of the crime."[91] A prerequisite of SOCA is a criminal conviction for a sex offense.[92] It is clearly a matter of administrative convenience for persons who are already incarcerated to be confined in a jail or correctional facility while awaiting their hearing. As such, we conclude that the Legislature had a reasonable basis for classifying dangerous sex offenders differently than the mentally ill under MHCA. Accordingly, J.R.'s argument is meritless.[93]

We conclude that the differences in classification between dangerous sex offenders and other mentally ill persons promote a legitimate state purpose and are rationally related to that purpose, protecting the public from dangerous sex offenders. As such, J.R.'s assignments of error involving equal protection violations are without merit.

6. Clear and Convincing Evidence

Finally, J.R. argues that the State failed to produce sufficient evidence that he is a dangerous sex offender; that there was a "recent act"[94]; and that inpatient, involuntary treatment is the least restrictive alternative. We disagree.

(a) Dangerous Sex Offender

[27] In order for J.R. to be considered a dangerous sex offender, the State must prove by clear and convincing evidence that J.R. is likely to engage in repeat acts of sexual violence and that he is substantially unable to control his criminal

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[90] *Id.*

[91] *Id.* at 777-78, 261 N.W.2d at 851.

[92] § 83-174.01.

[93] See *In re Detention of Samuelson, supra* note 79.

[94] Brief for appellant at 22.

behavior.[95] "Likely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public."[96] Not being able to control criminal behavior means "having serious difficulty in controlling or resisting the desire or urge to commit sex offenses."[97]

[28] The key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others.[98]

J.R. argues that in order for involuntary commitment under SOCA to comply with due process, the State was required to show that he has actually been dangerous in the recent past by providing evidence of an overt act, attempt, or threat to do substantial harm to himself or others. And J.R. argues that his conviction in 2000 is insufficient to prove that he committed a recent act that is probative of whether he will be dangerous in the future.

[29-31] We have stated: "To comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied."[99] In determining whether a person is dangerous, the focus must be on the person's condition at the time of the commitment hearing.[100] The actions and statements of the person prior to the commitment hearing are probative of the person's present mental condition.[101] But, for a past act to have evidentiary value, the past act must have some foundation for

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[95] See § 83-174.01(1).

[96] § 83-174.01(2).

[97] § 83-174.01(6).

[98] *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981).

[99] *Id.* at 57, 302 N.W.2d at 671.

[100] *In re Interest of Blythman, supra* note 98.

[101] *Id.*

a prediction of future dangerousness, thus being probative of that issue.[102]

In *In re Interest of Blythman*,[103] we considered whether a sexual assault that occurred 5 years before Theodore Blythman's commitment hearing was a "recent act." Since the time of the assault, Blythman was incarcerated. Blythman argued that if we were to conclude that the assault satisfies the recent act requirement, then involuntary civil commitment, regardless of how remote in time the act, threat, or violence was, would be permitted. We rejected this argument, stating: "[S]uch a result does not necessarily follow if it is kept in mind that any act that is used as evidence of dangerousness must be sufficiently probative to predict future behavior and the subject's present state of dangerousness."[104] We determined that Blythman's assault, which occurred 5 years before his commitment hearing, was probative of whether he was still dangerous and stated that "[t]his is particularly true since [Blythman] did not have an opportunity to commit a more recent act in the intervening years."[105] Further, we opined that the Legislature did not intend for a sex offender to be given the opportunity to commit a more recent act once a sufficient amount of time has passed since the last act in order to meet the recent act requirement.[106]

At the time *In re Interest of Blythman* was decided, SOCA had not been enacted. Blythman was committed under MHCA. Under MHCA, the definition of a mentally ill and dangerous person was defined as someone who is mentally ill and poses a substantial risk of harm to others "as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm."[107] SOCA does not include § 71-908 in its definition. It is unclear whether the Legislature

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[102] See *id.*

[103] *Id.*

[104] *Id.* at 59, 302 N.W.2d at 672.

[105] *Id.*

[106] *Id.*

[107] § 71-908(1).

intended for the recent act requirement of § 71-908 to apply to SOCA.

Assuming without deciding that the recent act requirement must be fulfilled for J.R. to be adjudged a dangerous sex offender, we determine that the State satisfied such a requirement in this case. The State proved that J.R.'s sexual assaults on his girlfriend's daughter were probative to the issue of whether he is still a danger.

Skulsky testified that J.R. is a pedophile, suffers from cannabis dependence and depression, and has a personality disorder. Skulsky also testified that J.R. has inadequate emotional controls and that until successfully completing treatment, J.R. would have a hard time controlling his sexual urges. J.R. did not complete sex offender treatment while in prison. Considering this evidence, we believe that J.R.'s acts of sexual assaults on his girlfriend's daughter are probative on the issue of dangerousness.

J.R. asserts that the sexual assault is not probative of whether he is still dangerous, because he could have taken "advantage of opportunities to assault other children, [or] to further assault his victim" before being sentenced, but instead, he sought voluntary therapy.[108] J.R. was charged on May 8, 2000, and was sentenced on December 15. In March 2000, J.R. had sought professional counseling. However, J.R. sexually assaulted his girlfriend's daughter for a period of at least 5 years, and J.R. never sought treatment until his victim reported the assaults. Although J.R. did not reoffend immediately before being incarcerated, the fact that his sexual offenses continued for a period of at least 5 years remains probative of whether he is still dangerous.

J.R. also argues he cannot be characterized as a dangerous sex offender because his Static-99 results placed him at the lowest level to reoffend. This argument is without merit. First, we have never concluded that the results of the Static-99 are dispositive of whether a person is a dangerous sex offender. And, although J.R. scored a zero on the Static-99, the record indicates that the Static-99 may have underestimated J.R.'s

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[108] Brief for appellant at 23.

risk for reoffending, because J.R.'s treatment staff still had concerns regarding that risk. Further, in Skulsky's professional opinion, despite the Static-99 results, J.R. still poses a danger to society. As such, we conclude that J.R.'s argument is without merit.

J.R. also attacks the credibility of Skulsky's opinion, arguing that Skulsky did not conduct a thorough evaluation. J.R.'s basis for such argument is that Skulsky did not consider a previous evaluation of J.R. that Skulsky had conducted. Skulsky explained that he did not consider this evaluation because of an issue regarding payment.

[32] We consider the fact that the Board saw and heard Skulsky's testimony and observed his demeanor while testifying, and give great weight to the Board's judgment as to credibility.[109] Skulsky testified that despite any prior assessments or any issues regarding payment, he accurately evaluated J.R. Specifically, Skulsky stated: "I wouldn't have agreed to [evaluate him] if I thought I'd be influenced about the current work." In our review, we give significant deference to the fact the Board found Skulsky's testimony credible. We also note that none of the previous evaluations that J.R. complains of were introduced into evidence. Presumably, J.R. would have introduced into evidence any previous evaluations if they were favorable. We conclude that Skulsky's evaluation was sufficient and probative of whether J.R. remains a danger to society.

(b) Least Restrictive Alternative

Next, we consider J.R.'s assertion that inpatient, involuntary treatment was not the least restrictive alternative. He argues that the State failed to produce sufficient evidence that he is still dangerous and that the State failed to provide any evidence why inpatient, involuntary treatment is the least restrictive alternative.

J.R. relies on the fact that he has contacted treatment facilities in anticipation of his release. However, according to Skulsky, inpatient, involuntary treatment is the least restrictive

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[109] See *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006).

alternative, because if J.R. were to be released into society without further treatment, the threat of harm would be great. Skulsky stated that "given the personality diagnoses of emotional disturbance, Pedophilia, combined with the lack of successful treatment of sex offender issues indicates [sic] that [J.R.] still needs treatment on an inpatient locked unit."

Moreover, the record does not indicate that J.R. has ever successfully completed treatment in the past, including the voluntary treatment he sought before sentencing. Considering that the Board had the opportunity to observe Skulsky's testimony, we cannot conclude that the Board's finding that inpatient, involuntary treatment is the least restrictive alternative was not supported by clear and convincing evidence.

The order of the district court affirming the Board's action is supported by clear and convincing evidence that J.R. is a dangerous sex offender and that neither voluntary hospitalization nor other treatment alternatives less restrictive of J.R.'s liberty are available.

VI. CONCLUSION

We conclude that SOCA is civil in nature and that, therefore, it may be applied retroactively without violating principles of double jeopardy or ex post facto. Additionally, we conclude that SOCA does not violate the Equal Protection Clauses, as dangerous sex offenders are not similarly situated to other non-sex-related offenders and because the Legislature had a rational and legitimate basis for treating sex offenders differently than the mentally ill. Finally, we conclude that the Board's finding that J.R. is a dangerous sex offender was supported by clear and convincing evidence. As such, we affirm the judgment of the district court.

AFFIRMED.

JEFFREY JAY REED, APPELLEE, V. CHRISTINE JENNIFER REED, APPELLANT.

763 N.W.2d 686

Filed March 20, 2009. No. S-06-757.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Parties: Words and Phrases.** An indispensable or necessary party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the necessary party's interest or which is such that not to address the interest of the necessary party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.
4. **Courts: Parties.** A court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.
5. **Courts: Parties: Jurisdiction.** The presence of necessary parties is jurisdictional, and the absence of necessary parties deprives the district court of jurisdiction.
6. **Equity: Parties: Final Orders.** All persons whose rights will be directly affected by a decree in equity must be joined as parties in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy.
7. **Equity: Parties: Contracts.** All persons interested in the contract or property involved in a suit, or whose interests therein may be affected by the decree in equity, are necessary parties.
8. **Debtors and Creditors: Conveyances: Fraud: Parties.** In all actions brought by creditors to subject property which it is claimed was fraudulently transferred, the person to whom the property has been transferred is a necessary party.
9. **Courts: Jurisdiction: Divorce: Property Division: Equity.** The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the district court of jurisdiction to determine an equitable division of those assets.
10. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.
11. **Divorce: Property: Words and Phrases.** "Dissipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated

to the marriage at the time when the marriage is undergoing an irretrievable breakdown.

12. **Divorce: Property Division.** Marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. On motion for rehearing, reargument granted. See 275 Neb. 418, 747 N.W.2d 18 (2008), for original opinion. Original opinion withdrawn. Affirmed.

John W. Ballew, Jr., and Jennifer L. Tricker, of Ballew Covalt, P.C., L.L.O., for appellant.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Christine Jennifer Reed and Jeffrey Jay Reed's marriage was dissolved by the district court, but the court rejected Christine's claims that Jeffrey's predivorce transfers of certain business assets were fraudulent. The primary issues in this appeal are whether the transferees of disputed transfers are necessary parties to an action brought under Nebraska's Uniform Fraudulent Transfer Act (UFTA),[1] and whether Christine can obtain equitable relief for the alleged dissipation of marital assets. For the reasons that follow, we conclude that the absence of necessary parties precluded Christine from proceeding under the UFTA and that Christine has not shown that Jeffrey dissipated marital assets. Therefore, we affirm the district court's judgment.

BACKGROUND

In 1997, Christine and Jeffrey formed C.J. Reed Enterprises, Inc. (C.J. Reed), to purchase and operate a jewelry store. Christine and Jeffrey obtained bank financing, and Jeffrey's parents, James and Precious Reed, agreed to act as sureties on the loan. On July 11, 1997, Christine, Jeffrey, James, and

[1] Neb. Rev. Stat. §§ 36-701 to 36-712 (Reissue 2008).

Precious executed an agreement setting forth each party's rights and obligations. At the time, Christine and Jeffrey each owned one-half the shares of C.J. Reed stock. The agreement specified that James and Precious could take title to all of C.J. Reed's stock if Christine or Jeffrey failed to discharge her or his obligations as owners of C.J. Reed to the satisfaction of James and Precious. Among other things, the agreement required Christine and Jeffrey to avoid "default" in making "payment to trade creditors or any other creditors."

In 2000, James and Precious paid Christine and Jeffrey's bank debt and became the sole financiers of the business. The principal on Christine and Jeffrey's loan was $576,595.92, and interest was calculated at $188,163, assuming the loan was paid within 10 years. Between May 2001 and the time of the divorce proceeding, Christine and Jeffrey paid $3,000 toward the principal and $40,000 toward the interest. Christine and Jeffrey each concede that this constituted a "default" within the meaning of the July 1997 agreement with James and Precious.

In January 2004, Jeffrey formed R.S. Wheel, L.L.C., with Dr. Steven Schneider. R.S. Wheel spent $380,000 (or between $3 and $4 a square foot) to purchase a former motel property in Grand Island, Nebraska, across the street from a location where Wal-Mart planned to open a store. The hope was that the land could be resold for a profit due to its location. R.S. Wheel obtained bank financing for the purchase and, at the time of trial, owed $383,842.70 on the loan.

Jeffrey informed James in early June 2004 of his intent to divorce Christine, and James evidently informed Jeffrey that if Jeffrey was going to divorce Christine, James and Precious were going to take the jewelry store. So, on June 11, James and Precious notified their attorney that they wanted to exercise their option to take title of C.J. Reed. On June 15, Christine and Jeffrey were sent letters informing them that James and Precious were transferring all the shares of C.J. Reed stock to themselves. An appraiser, hired by Christine, opined that on March 31, 2004, based on the income of the business, the stock was worth between $164,900 and $178,700. But it is unclear from the record and testimony whether that valuation accounted

for the debt to James and Precious, and it appears that it did not. James and Precious later sold the business, but were unable to sell it for enough money to cover the outstanding debt.

Jeffrey also discussed his plans to divorce Christine with Schneider. Schneider said that because of the divorce, Jeffrey was unsure of his future cashflow or ability to assist in making payments on R.S. Wheel's debt. Jeffrey also suggested that R.S. Wheel might be unable to sell or develop the property because of the imminent divorce proceedings. Jeffrey suggested that Schneider find another partner or buy Jeffrey out. Schneider agreed to buy Jeffrey out, and on June 18, 2004, Jeffrey transferred his interest in R.S. Wheel to Schneider. In return, on June 21, Jeffrey received a check for $15,000.

Jeffrey filed for divorce on June 24, 2004. Christine answered Jeffrey's complaint and counterclaimed for dissolution. Christine's operative counterclaim alleged that the transfer of C.J. Reed stock and the sale of Jeffrey's interest in R.S. Wheel were fraudulent transfers within the meaning of the UFTA. Christine prayed that the court "make a determination as to whether a fraudulent conveyance of real and/or personal property has occurred immediately prior to the filing of this divorce, whether the marital estate was dissipated as a result thereof and enter such equitable relief as may be appropriate." It should be noted the record contains no indication that James, Precious, or Schneider were made parties to or formally notified of the fraudulent transfer claim or that either Christine or Jeffrey sought to implead James, Precious, or Schneider, or provide them with formal notice.

On July 26, 2004, Schneider and Jeffrey, who is employed as a real estate broker, entered into an "Exclusive Listing Agreement" for Jeffrey to list R.S. Wheel's property for sale at a price of $925,000. Jeffrey was to receive a 5-percent commission of the gross sale price for his work in selling the property. But at the time of trial, the property had not been sold. Jeffrey testified that the property had been listed at $6 to $8 per square foot and might be worth that once it was developed. But Jeffrey also testified that R.S. Wheel has "paid $3 to $4 a square foot for [the property]; that's what it's worth." Jeffrey and Schneider both testified that the price on the listing was

high so it would be easier to negotiate with potential buyers by lowering the price.

In addition, a temporary child support and spousal support order was entered on December 1, 2004, although the amount Jeffrey was to pay each month was reduced in an order filed March 15, 2005. On December 12, Christine filed a motion for an order to show cause why Jeffrey should not be held in contempt of court, alleging a total arrearage of $9,544.72.

The district court deferred ruling on the contempt issue until after a trial on all issues had been completed. In its decree, the court awarded sole legal and physical custody of the parties' children to Christine and entered permanent awards of child support and alimony. The court dismissed the contempt action, reasoning that the "orders for child support and alimony under [the] Decree are less than the temporary orders and [Jeffrey] now has greater resources available to pay on arrearages." The court also rejected Christine's arguments with respect to fraudulent transfers. The court reasoned, with respect to C.J. Reed, that Christine and Jeffrey were in default on their payments to James and Precious, giving James and Precious the right to transfer the C.J. Reed stock. The court concluded that "[t]he transfer of stock to James and Precious Reed was not a fraudulent conveyance, but rather a transfer of secured property pursuant to [the financing agreement]."

With respect to R.S. Wheel, the court reasoned that "the parties were not in good financial shape" at the time of the sale and that a divorce was certain to bring additional expenses in the form of child support and alimony. Jeffrey had testified that he would have been unable to service his portion of R.S. Wheel's debt. Thus, the court concluded that "the sale of Jeffrey's interest [in R.S. Wheel] to Dr. Schneider was for legitimate financial reasons and was not a fraudulent transfer as alleged by Christine."

Christine appealed, and we affirmed the judgment.[2] Christine filed a motion for rehearing, which we sustained. We now withdraw our original opinion, for the reasons explained below, and substitute this opinion affirming the judgment.

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[2] See *Reed v. Reed*, 275 Neb. 418, 747 N.W.2d 18 (2008).

ASSIGNMENTS OF ERROR

In her appellate brief, Christine assigns that the district court erred in failing to (1) find that the transfer of Jeffrey's interest in R.S. Wheel was a fraudulent transfer in violation of the UFTA, (2) find that the transfer of Jeffrey's interest in C.J. Reed was a fraudulent transfer in violation of the UFTA, (3) set aside the transfers of Jeffrey's interest in R.S. Wheel and C.J. Reed for the purposes of determining the value of the marital estate and dividing it equitably, and (4) include the value of the fraudulent transfers in the marital estate and distribute the value equitably between the parties.

In addition, in our order sustaining Christine's motion for rehearing, we directed the parties to brief (1) whether the public policy of the UFTA would be served by applying its provisions to the transfer of alleged marital assets and (2) whether the trial court's jurisdiction to consider Christine's fraudulent transfer claims was affected by the absence of necessary parties.

STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[3]

[2] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[4]

ANALYSIS

UFTA

In our initial decision in this appeal, we held that a former spouse's right to an equitable division of the marital estate is not a "'right to payment'" under the UFTA and that thus,

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[3] *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008); *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[4] *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

a former spouse does not qualify as a "'creditor'" under the UFTA by virtue of his or her right to an equitable share of the marital estate.[5] We stated that Christine's status as a child support creditor did not confer status as a creditor for purposes of restoring fraudulently transferred assets to the marital estate. As a result, we concluded that the UFTA did not apply to Christine's claims that the predivorce transfers of Jeffrey's business interests should be set aside as fraudulent.[6] Thus, we affirmed the district court's judgment.

But in reaching that conclusion, we failed to note relevant authority from other jurisdictions holding that a former spouse may obtain relief from a fraudulent transfer intended to defeat equitable distribution of the marital estate,[7] including authority specifically arising under those jurisdictions' versions of the

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[5] *Reed, supra* note 2, 275 Neb. at 425, 747 N.W.2d at 23.

[6] See *id*.

[7] See, e.g., *Buchanan v. Buchanan*, 266 Va. 207, 585 S.E.2d 533 (2003); *A & L, Inc. v. Grantham*, 747 So. 2d 832 (Miss. 1999); *Clayton v. Clayton*, 153 Vt. 138, 569 A.2d 1077 (1989); *Fricke v. Fricke*, 491 A.2d 990 (R.I. 1985); *Pennock v. Pennock*, 356 N.W.2d 913 (S.D. 1984); *Pattillo v. Pattillo*, 414 So. 2d 915 (Ala. 1982); *Du Mont v. Godbey*, 382 Mass. 234, 415 N.E.2d 188 (1981); *Adamson v. Adamson*, 273 Or. 382, 541 P.2d 460 (1975); *Pierson v. Barkley*, 253 Ark. 131, 484 S.W.2d 872 (1972); *Powers v. Powers*, 229 Ga. 450, 192 S.E.2d 268 (1972); *Stephenson v. Stephenson*, 111 N.H. 189, 278 A.2d 351 (1971); *Caldwell v. Caldwell*, 5 Wis. 2d 146, 92 N.W.2d 356 (1958); *Rozan v. Rozan*, 49 Cal. 2d 322, 317 P.2d 11 (1957); *Zingone v. Zingone*, 136 Colo. 39, 314 P.2d 304 (1957); *Hasegawa v. Hasegawa*, 290 A.D.2d 488, 736 N.Y.S.2d 398 (2002); *Firmani v. Firmani*, 332 N.J. Super. 118, 752 A.2d 854 (2000); *Bradford v. Bradford*, 993 P.2d 887 (Utah App. 1999); *Dietter v. Dietter*, 54 Conn. App. 481, 737 A.2d 926 (1999); *Gerow v. Covill*, 192 Ariz. 9, 960 P.2d 55 (Ariz. App. 1998); *Leathem v. Leathem*, 94 Ohio. App. 3d 470, 640 N.E.2d 1210 (1994); *Johnson v. Dowell*, 592 So. 2d 1194 (Fla. App. 1992); *In re Marriage of Pahlke*, 154 Ill. App. 3d 256, 507 N.E.2d 71, 107 Ill. Dec. 407 (1987); *Sherry v. Sherry*, 108 Idaho 645, 701 P.2d 265 (Idaho App. 1985); *Sloan v. Sloan*, 683 S.W.2d 751 (Tex. App. 1984); *In re Marriage of Huth*, 437 N.E.2d 1042 (Ind. App. 1982); *Beatty v. Beatty*, 186 So. 2d 855 (La. App. 1966). See, also, *Wallace v. Wallace*, 170 W. Va. 146, 291 S.E.2d 386 (1982); *Rozan v. Rozan*, 129 N.W.2d 694 (N.D. 1964). See, generally, Brett R. Turner, *Division of Third-Party Property in Divorce Cases*, 18 J. Am. Acad. Matrim. Law 375 (2003).

UFTA[8] or its functionally similar predecessor, the Uniform Fraudulent Conveyance Act.[9] While many of those courts have not found it necessary to discuss the "creditor" status of the spouse, others have specifically held that the spouse is a "creditor" within the meaning of the relevant statute.[10] This is significant because § 36-712 requires that the UFTA "be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the act among states enacting it." In addition, we did not consider the broad prayer for relief in Christine's operative counterclaim, which could encompass enforcement of the past-due child support award. And we have held that a child support creditor may use the UFTA to pursue transferred assets that are needed to satisfy a child support award.[11]

In the end, however, we need not decide the extent to which the UFTA is applicable to the equitable division of marital property. In this case, as suggested by our briefing order on reargument, application of the UFTA was precluded by the failure to join necessary parties.

[3-5] An indispensable or necessary party is one whose interest in the subject matter of the controversy is such that the controversy cannot be finally adjudicated without affecting the necessary party's interest or which is such that not to address the interest of the necessary party would leave the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.[12] A court may

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[8] See, *Firmani, supra* note 7; *Bradford, supra* note 7; *Dietter, supra* note 7; *Gerow, supra* note 7; *In re Marriage of Zabel v. Zabel*, 210 Wis. 2d 336, 565 N.W.2d 240 (Wis. App. 1997); *Varner v. Varner*, 662 So. 2d 273 (Ala. Civ. App. 1994). Cf. *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008).

[9] Compare, Unif. Fraudulent Transfer Act, 7A (part II) U.L.A. 2 (2006); Unif. Fraudulent Conveyance Act, 7A U.L.A. 427 (1985). See, *Du Mont, supra* note 7; *Caldwell, supra* note 7. See, also, *Rozan*, 129 N.W.2d 694, *supra* note 7; *Galgano v. Ortiz*, 287 A.D.2d 688, 732 N.Y.S.2d 77 (2001).

[10] See, *Du Mont, supra* note 7; *Bradford, supra* note 7; *In re Marriage of Zabel, supra* note 8. See, also, *Zingone, supra* note 7; *Johnson, supra* note 7.

[11] See *Parker v. Parker*, 268 Neb. 187, 681 N.W.2d 735 (2004).

[12] *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008).

determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights; but when a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought in.[13] The presence of necessary parties is jurisdictional, and the absence of necessary parties deprives the district court of jurisdiction.[14]

[6-8] An action under the UFTA is equitable in nature,[15] and all persons whose rights will be directly affected by a decree in equity must be joined as parties in order that complete justice may be done and that there may be a final determination of the rights of all parties interested in the subject matter of the controversy.[16] Specifically, all persons interested in the contract or property involved in the suit, or whose interests therein may be affected by the decree in equity, are necessary parties.[17] Thus, we held at common law that "'in all actions brought by creditors to subject property which it is claimed was fraudulently transferred, . . . [t]he person to whom the property has been transferred is . . . a necessary party.'"[18] That generally reflects the law under the UFTA,[19] and in marital dissolution actions.[20]

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[13] Neb. Rev. Stat. § 25-323 (Reissue 2008).

[14] See *Pestal, supra* note 12.

[15] See *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

[16] See *Langemeier v. Urweiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000).

[17] See *id.*

[18] *First Nat. Bank of Plattsmouth v. Gibson*, 69 Neb. 21, 26, 94 N.W. 965, 967 (1903). See, also, *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N.W. 401 (1914); *Ainsworth v. Roubal*, 74 Neb. 723, 105 N.W. 248 (1905).

[19] See, *Valvanis v. Milgroom*, 529 F. Supp. 2d 1190 (D. Haw. 2007); *Nastro v. D'Onofrio*, 263 F. Supp. 2d 446 (D. Conn. 2003); *Tanaka v. Nagata*, 76 Haw. 32, 868 P.2d 450 (1994); *Estes v. Titus*, 273 Mich. App. 356, 731 N.W.2d 119 (2006), *affirmed in part and in part vacated on other grounds* 481 Mich. 573, 751 N.W.2d 493 (2008).

[20] See, *Becker v. Becker*, 138 Vt. 372, 416 A.2d 156 (1980); *Murray v. Murray*, 358 So. 2d 723 (Miss. 1978). Cf. *McGinley v. McGinley*, 7 Neb. App. 410, 583 N.W.2d 77 (1998).

Of course, the problem in this case is that Christine's fraudulent transfer claims implicate the interests of James, Precious, and Schneider, who ended up with the assets that Christine claims were fraudulently transferred. Because those interests would be affected if the transfers were set aside or the assets attached, James, Precious, and Schneider were necessary parties to that extent.

[9] But Christine's counsel asserted, at oral argument on rehearing, that Christine was not seeking to have the transfers set aside; rather, she had only sought to have the *value* of the transferred assets included in the marital estate for purposes of equitable division. It has been held that if an action is brought for wrongful transfer and it is possible to fashion relief which does not adversely affect the transferee's interest, then the transferee may not need to be joined in an action for judgment of damages against a defendant.[21] And we have held that the determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the district court of jurisdiction to determine an equitable division of those assets—i.e., to award the *value* of a share of the disputed assets.[22]

Jeffrey's counsel contended, at oral argument on rehearing, that Christine's waiver of any remedy other than equitable credit had not been clear before the rehearing was sustained and that our briefing order raised the issue of necessary parties. We are inclined to agree, but accept Christine's concession at face value. Given that concession, the question at this point is whether Christine is making a claim under the UFTA at all.

The UFTA is simply the latest in a line of statutes dating back to the reign of Elizabeth I[23] that declares rights and provides remedies for unsecured creditors against transfers that

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[21] See *Gerow, supra* note 7.

[22] See *Baker v. Baker*, 201 Neb. 409, 267 N.W.2d 756 (1978).

[23] See An Act Against Fraudulent Deeds, Alienations, etc., 1570, 13 Eliz. c. 5, § 2 (Eng.).

impede the collection of claims.[24] In other words, the purpose of the UFTA is to provide creditors with a means to satisfy debts using assets that have been fraudulently transferred.[25] But Christine has waived any interest in pursuing the disputed assets. As a result, Christine is not seeking any remedy that is not available to her in a dissolution action as an alleged dissipation of marital assets.[26] And we read Christine's operative counterclaim, and her appellate argument, to articulate a claim for equitable relief under that doctrine.

Christine notes that the UFTA permits a creditor to obtain, "subject to applicable principles of equity," "any other relief the circumstances may require."[27] But under these circumstances, the "applicable principles of equity" are the well-established equitable principles applicable to valuation and division of the marital estate—including the doctrine of dissipation, which provides the relief that Christine is requesting.

We have said that where all the parties necessary to a proper and complete determination of an equity cause were not before the court, an appellate court may remand the cause for the purpose of having such parties brought in.[28] But there is no reason to do so here, because Christine has, in effect, waived her UFTA claim in favor of a claim for dissipation of marital assets. James, Precious, and Schneider are not necessary parties to such a claim.[29]

To summarize: To the extent that Christine sought to set aside the disputed transfers, the trial court lacked jurisdiction because of Christine's failure to join necessary parties. But Christine now disclaims any interest in setting aside the transfers. So her claim is best characterized as a claim for

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[24] See, generally, *Mejia v. Reed*, 31 Cal. 4th 657, 74 P.3d 166, 3 Cal. Rptr. 3d 390 (2003).

[25] See, generally, Unif. Fraudulent Transfer Act, *supra* note 9, Prefatory Note, 7A (part II) U.L.A. 4.

[26] See, *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001); *Baker, supra* note 22; *Malin v. Loynachan*, 15 Neb. App. 706, 736 N.W.2d 390 (2007).

[27] See § 36-708.

[28] *Vaccaro v. City of Omaha*, 254 Neb. 800, 579 N.W.2d 535 (1998).

[29] See *Baker, supra* note 22.

dissipation of marital assets, which she also presented, and which requires only Christine and Jeffrey as parties. We need not further consider the UFTA or Christine's first two assignments of error. Instead, we consider Christine's arguments and her third and fourth assignments of error in the context of dissipation of marital assets, discussed below. We note, however, that much of our reasoning below would also have been relevant under the UFTA.

Dissipation of Marital Assets

[10-12] As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.[30] We have explained that "[d]issipation of marital assets" is defined as one spouse's use of marital property for a selfish purpose unrelated to the marriage at the time when the marriage is undergoing an irretrievable breakdown.[31] As a remedy, we have held that marital assets dissipated by a spouse for purposes unrelated to the marriage should be included in the marital estate in dissolution actions.[32]

It is apparent that the disputed transfers in this case took place at the time when the marriage was undergoing an irretrievable breakdown, as both transfers took place specifically *because* Jeffrey intended to file for divorce. The record establishes that Jeffrey's interest in R.S. Wheel and the parties' interest in C.J. Reed were marital assets. And we assume, for purposes of this analysis, that disposing of marital assets for less than fair market value, in an alleged attempt to shield the assets from equitable distribution, would represent their use for a selfish purpose unrelated to the marriage.

But in this case, the record does not establish that the assets were disposed of for less than what they were worth. C.J. Reed, at the time James and Precious took possession of its stock, was encumbered by a debt of over half a million dollars. The income approach to valuation taken by Christine's expert witness does not appear to have accounted for that debt

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[30] *Harris, supra* note 26.

[31] *Id.* at 87, 621 N.W.2d at 501.

[32] See, *id.*; *Malin, supra* note 26.

in valuing the business. But even if it had, the record also establishes that James and Precious were not able to sell the business for enough money to cover the debt. While James and Precious took C.J. Reed as an asset from the marital estate, they also relieved the marital estate of the debt that Christine and Jeffrey had incurred. In short, the record does not establish that the transfer of C.J. Reed diminished the total value of the marital estate.

Similarly, the record does not establish that Jeffrey's sale of his interest in R.S. Wheel was for less than fair market value. At the time of trial, the real property that was R.S. Wheel's sole asset was encumbered by debt greater than the original purchase price of the property. Nor does the record contain an independent appraisal of the property's value.

Christine relies on the fact that by the time of trial, the property had been listed for sale at a far greater price than had been paid for it. But the record establishes that the property had not sold at that price, and Jeffrey testified that the listing price was based on improvements to the property that had not yet been made. Beyond that, it is clear from the record that the listing price was an amount that Schneider and Jeffrey hoped, but did not expect, to receive. A price is the amount that a willing seller indicates would be acceptable payment for property offered for sale, but *value* is the price actually obtainable for property offered for sale in a market.[33]

In other words, the listing price was what R.S. Wheel was *asking* for the property, but "[a]sking is one thing, getting is something quite different."[34] The listing price was not sufficient to prove the fair market value of the property, in the absence of other evidence establishing that the property was worth more than had been paid for it less than 6 months before Jeffrey's interest in R.S. Wheel had been transferred. Because the record does not establish that R.S. Wheel's assets were worth more than its outstanding debt, there is no evidence that Jeffrey's interest in R.S. Wheel was worth more than the $15,000

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[33] *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

[34] *Id.* at 264-65, 487 N.W.2d at 557.

Schneider paid for it. Thus, there is no evidence that the marital estate was diminished by the transfer.

On our de novo review of the record, we find no evidence showing that the value of the marital estate was diminished by the transfers of C.J. Reed and R.S. Wheel. The district court did not abuse its discretion in declining to include those assets in the marital estate. We find no merit to Christine's remaining assignments of error.

CONCLUSION

On rehearing, our original opinion in this matter is withdrawn. And for the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

MICHAEL ALBERT, APPELLEE, V. HERITAGE ADMINISTRATION SERVICES, INC., APPELLANT.

763 N.W.2d 373

Filed March 20, 2009. No. S-07-1044.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Contracts: Appeal and Error.** The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

Tim Engler, of Harding & Shultz, P.C., L.L.O., for appellant.

Paul E. Galter, of Butler, Galter, O'Brien & Boehm, for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

In this breach of contract action, Heritage Administration Services, Inc. (Heritage), appeals the judgment entered after trial by the district court for Lancaster County awarding Heritage's former agent, Michael Albert, damages of $76,230, covering the period May 1, 2004, through March 22, 2005. Relying on a provision of the "Agent's Agreement," "**VIII. DISCONTINUANCE OF PROGRAM**" (article VIII), Heritage claims that damages should have been limited to a 30-day period beginning in May 2004. We conclude that article VIII does not control this case and that the district court's findings are not clearly wrong. Accordingly, we affirm.

STATEMENT OF FACTS

Heritage was formed in 1999 by Rod Beery. Heritage underwrote automobile service and warranty contracts and performed claims administration for those contracts. Heritage used agents to market its programs to automobile dealerships.

Albert, who was a personal acquaintance of Beery, began working as an agent of Heritage in 1999. Albert and Heritage entered into an "Agent's Agreement" dated April 19, 1999 (hereinafter the Agreement), pursuant to which Albert would market various Heritage vehicle service contract programs to dealerships. The Agreement contained a provision, "**V. TERMINATION WITHOUT CAUSE**" (article V), which stated in part that the "Agreement may be canceled upon 30 days notice by either party." The Agreement also contained article VIII, which stated in part that "Heritage may discontinue or withdraw from [Albert] any of its programs upon 30 days written notice." At issue in this appeal is the "Engine for Life" program and specifically the commission Albert was to receive due to the sale of Engine for Life program contracts to an auto dealer, Anderson Ford.

In 2003, Heritage began a new warranty program called Engine for Life. On February 25, 2003, Albert and Heritage signed a document titled "**HERITAGE AGENT AGREEMENT AMENDMENT ENGINE FOR LIFE PROGRAM AUTHORITY**" (the Amendment). By its terms,

the Amendment was to attach to and thereby become a part of the Agreement. The Amendment authorized Albert to promote and sell the Engine for Life program products to "auto dealers" on Heritage's behalf. The Amendment does not list or otherwise limit the auto dealers to which Albert could sell Engine for Life program products. In the Amendment, the parties agreed that all other terms and conditions of the Agreement would remain unchanged. Beery assigned Albert to be the agent responsible for managing Heritage's Engine for Life program sales to Anderson Ford. The evidence shows that up to the time in dispute, pursuant to an oral agreement, Albert was paid a $30 commission for every Engine for Life program contract sold to Anderson Ford.

In April 2004, the Heritage board of directors removed Beery from his position as president and chief operating officer. In May 2004, interim management was brought in to take charge of operations. The interim management determined that the Anderson Ford account should be removed from Albert and given to another agent. Albert stopped receiving commissions on the sale of Engine for Life program products to Anderson Ford in May 2004.

In challenging the district court's findings, Heritage refers this Court to certain testimony from the trial, not repeated here, which it claims supports its argument on appeal that it gave Albert oral notice in May 2004 and thereby limited Albert's commissions to 30 days thereafter under article VIII. As the district court found and our review of the record shows, Albert testified that in May 2004, he had a conversation with a Heritage employee who was responsible for administering commissions paid to agents. That employee told Albert that he had learned that the new management would no longer pay Albert commissions for sales to Anderson Ford. Albert then spoke with Steve Goodrich, who was in a management position with Heritage. Albert told Goodrich that he had heard that he would no longer be paid such commissions. Albert testified that instead of terminating the agreement by which Albert had been the sales agent for the Anderson Ford account, Goodrich told Albert that Anderson Ford was "not going to have Engine for Life any more." Albert testified that

Goodrich specifically denied that another agent was being given the account and was going to receive the Engine for Life program sales commissions. Albert further testified that he proposed that he could try to sell the Engine for Life program products to another Ford dealership and that Goodrich indicated that Albert could continue to sell the program's products and said "sure." Peter Knolla, a member of Heritage management, testified at trial that in May 2004 a decision was "made to discontinue paying . . . Albert for Engine for Life contracts involving Anderson Ford" and to give the account to another agent. Knolla also testified that at that time, the interim management did not realize that Albert had a written agreement with Heritage.

In February 2005, the management of Heritage learned of the Agreement and the Amendment. Heritage provided Albert a written notice dated February 14, 2005, that it was terminating the Agreement pursuant to article V. The notice stated that termination would be effective 30 days from receipt of the letter. A certified receipt indicated that the letter was delivered to Albert on February 22.

Albert filed the present action on September 2, 2005. Albert alleged that in May 2004, Heritage wrongfully discontinued payment to him of the commissions on the Engine for Life program products sold through Anderson Ford. Albert sought, inter alia, judgment in the amount of $30 for each of the thousands of Engine for Life contracts which continued to be sold through Anderson Ford since May 2004.

Following a bench trial, the court entered an order dated August 31, 2007, setting forth its findings of fact and conclusions of law. In the order, the court noted that "[w]hen [Albert] contacted Heritage concerning the rumor [regarding Anderson Ford], he was informed that the Anderson Motor contract had been terminated. In reality it had not, and another agent began receiving commissions for the Anderson contract." With regard to written notice of termination of the Agreement, the court made the following finding:

> On February 14, 2005, Heritage sent actual written notice to [Albert] informing him that his Agent's Agreement was being terminated. This notice was received on February

> 22, 2005. Thus, the court finds that plaintiff is entitled to commissions for contracts sold, pursuant to the Engine for Life program, through March 22, 2005.

The court found that Albert was entitled to a commission of $30 for each of the 2,541 Engine for Life program contracts that the evidence established were purchased through Anderson Ford between May 1, 2004, and March 22, 2005. The court therefore entered judgment in favor of Albert in the amount of $76,230.

Heritage appeals.

ASSIGNMENTS OF ERROR

Heritage asserts that the district court erred in (1) failing to find that Heritage gave Albert oral notice in May 2004 that it was withdrawing the Anderson Ford Engine for Life "account" from him as Heritage was entitled to do under article VIII of the Agreement and (2) awarding damages for the period ending 30 days after written notice was given in February 2005 rather than limiting damages to the period ending 30 days after oral notice that Heritage was withdrawing the Anderson Ford Engine for Life "account" given in May 2004 as Heritage was entitled to do under article VIII of the Agreement.

STANDARDS OF REVIEW

[1,2] A suit for damages arising from breach of a contract presents an action at law. *Magistro v. J. Lou, Inc.*, 270 Neb. 438, 703 N.W.2d 887 (2005). In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

[3] The interpretation of a contract involves a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 275 Neb. 310, 746 N.W.2d 672 (2008).

ANALYSIS

Our analysis on appeal is controlled by the assignments of error which are asserted by Heritage. In challenging the district

court's rulings, Heritage refers us exclusively to article VIII of the Agreement, which provides in its entirety as follows:

> **VIII. DISCONTINUANCE OF PROGRAM**
>
> Heritage may discontinue or withdraw from Representative any of its programs upon 30 days written notice. If such discontinuance or withdrawal is required by any State, Federal, or other legal authority, then Heritage shall provide 10 days written notice to Representative of the discontinuance of such Program.

Heritage claims that the district court's rulings were in error under article VIII. In considering the assignments of error as framed by Heritage, we therefore focus on whether the district court's findings of facts after trial are either clearly wrong, see *Aon Consulting, supra*, or whether its conclusions of law amount to error as a matter of law under article VIII, see *R.J. Reynolds Tobacco Co., supra*. Upon review, we determine that the court's findings are supported by the record and are not clearly wrong. Further, we conclude that the conclusions of law are not in error.

Heritage claims on appeal that it gave Albert "verbal notice in May of 2004 that he would no longer be the company's agent for the Anderson Ford [Engine for Life] *account*." Brief for appellant at 11 (emphasis supplied). Heritage asserts that such alleged notice was given and effective pursuant to article VIII, the discontinuance of program provision of the Agreement. Heritage claims that the damages awarded to Albert should have been limited to the period ending 30 days after such oral notice was given. We reject this argument.

In the Agreement, there are two provisions requiring notice to Albert that are arguably relevant in this case. The first is a provision in article V for termination of the Agreement without cause, which states that the "Agreement may be canceled upon 30 days notice by either party." The second is a provision in article VIII, upon which Heritage relies in this appeal, which states that "Heritage may discontinue or withdraw from [Albert] any of its programs upon 30 days written notice." The district court found, and neither party disputes, that the written notice Heritage provided to Albert in February 2005 was actual notice as required under the termination without cause

provision in article V that allowed either party to cancel the Agreement upon 30 days' notice. Heritage, however, asserts that its communications in May 2004 were effective termination under article VIII.

With regard to the communications in May 2004, neither party claims they were written. The court found that in May 2004, "[w]hen [Albert] contacted Heritage concerning the rumor [regarding Anderson Ford], he was informed that the Anderson Motor contract had been terminated. In reality it had not, and another agent began receiving commissions for the Anderson contract." Elsewhere, the court found that 2,541 Engine for Life program contracts were purchased by Anderson Ford between May 1, 2004, and March 22, 2005.

The evidence in this case supports the court's factual findings in this regard, and they are not clearly wrong. Albert testified that in May 2004, he heard a rumor from a Heritage employee that Heritage would no longer pay Albert commissions with respect to sales to Anderson Ford. Albert further testified that he spoke with Goodrich, a member of Heritage management, regarding the rumor. Goodrich told Albert that the reason Albert would no longer receive the commissions was because Anderson Ford would no longer be participating in the Engine for Life program. Goodrich specifically denied to Albert that the commissions would be going to a different agent.

There is no evidence that the Engine for Life program in its entirety was discontinued or that the program was withdrawn from Albert. To the contrary, the evidence indicates that the Engine for Life program continued to be sold and that Albert was permitted to sell the program elsewhere. In this regard, we note that Goodrich assented to Albert's suggestion that Albert should continue to sell the Engine for Life program to another automobile dealer. Heritage did not present evidence to contradict Albert's testimony regarding the oral May 2004 communications between Albert and Heritage management. For completeness, we note that Knolla, another member of Heritage management, testified that Heritage decided in May 2004 to stop paying Anderson Ford commissions to Albert and to give the account to another agent; however, there was no

testimony that Heritage communicated such decision to Albert in May 2004.

Article VIII of the Agreement upon which Heritage relies provides that Heritage may "discontinue or withdraw from [Albert] any of its *programs* upon 30 days written notice." (Emphasis supplied.) The evidence shows that Heritage did not communicate to Albert in May 2004 that it was discontinuing the Engine for Life program in its entirety or that it was withdrawing the Engine for Life program from Albert. Even if Heritage's intention in May 2004 was in fact to withdraw the program from Albert and to give the program to another agent, there is no evidence that Heritage communicated such intention to Albert in May 2004. Further, none of the communications at issue in May 2004 were in writing.

Because Heritage did not communicate to Albert in writing in May 2004 that it was discontinuing the Engine for Life program in its entirety or withdrawing the program from Albert in particular, we conclude that Heritage's first assignment of error claiming that the district court failed to find effective termination under the terms of article VIII of the Agreement is without merit.

Heritage's second assignment of error and arguments regarding the award of damages for greater than 30 days claim that Heritage gave Albert oral notice in May 2004 that it was withdrawing the Engine for Life "account" and that such notice effectively complied with the requirements of article VIII of the Agreement, thereby limiting Albert's damages to 30 days. Heritage's argument is not supported by the evidence or article VIII of the Agreement, and we determine that Heritage's second assignment of error is without merit.

As noted above, article VIII covers the withdrawal of a "program" which an agent may sell, as opposed to merely the withdrawal of one "account" to which a program may be sold as urged by Heritage. Further, article VIII requires that withdrawal of a program from an agent such as Albert be in writing. The evidence on which Heritage relies regarding the withdrawal of the Anderson "account" orally is of no legal significance under article VIII, which instead deals with withdrawal of a "program." The evidence indicates that Albert was still free to sell

the Engine for Life program to other auto dealers, and therefore, the "program" was not withdrawn from Albert and article VIII does not apply or afford relief to Heritage. Thus, as noted above, the evidence does not support the assertions of Heritage that under article VIII the district court erred in awarding damages in excess of 30 days after May 2004.

CONCLUSION

We determine that the district court's findings are not clearly wrong and the conclusions of law are not in error under article VIII of the Agreement. We, therefore, conclude that the entry of judgment in favor of Albert in the amount of $76,230 is correct under the facts and controlling agreements. We affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JAMES R. PISCHEL, APPELLANT.
762 N.W.2d 595

Filed March 20, 2009. No. S-08-359.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. ____: ____: ____: ____. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact.
3. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, an appellate court will uphold its findings of fact unless they are clearly erroneous. But an appellate court reviews de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search.
4. **Jury Instructions: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.

5. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.
6. **Entrapment: Jury Instructions.** When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment.
7. **Criminal Law: Entrapment: Words and Phrases.** In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense.
8. **Entrapment: Evidence: Proof.** The burden of going forward with evidence of government inducement is on the defendant. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. This determination is made as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden.
9. **Entrapment: Evidence.** A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses.
10. **Entrapment: Evidence: Words and Phrases.** Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it.
11. **Entrapment: Words and Phrases.** Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive.
12. **Trial: Juries: Evidence.** A trial court has broad discretion in deciding whether to submit nontestimonial exhibits to the jury during its deliberations.
13. ____: ____: ____. Trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant's guilt.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

James R. Pischel appeals his conviction for use of a computer to entice a child or a peace officer believed to be a child for sexual purposes, a violation of Neb. Rev. Stat. § 28-320.02 (Reissue 2008). Pischel asserts generally that there was insufficient evidence to support his conviction. Pischel specifically asserts that the district court for Lancaster County erred in overruling his motion to suppress evidence seized as a result of a warrantless search of his vehicle, refusing to instruct the jury on entrapment, and allowing the jury access to certain exhibits during deliberations. We affirm.

STATEMENT OF FACTS

Edward Sexton, an officer with the Lincoln Police Department, was assigned as an investigator in the technical investigations unit. As part of his investigative duties, Sexton would go into online chat rooms posing as a person under the age of 16. In February 2007, Sexton created a fictional profile with the screen name "ljb92." The profile for "ljb92" indicated that the user was a female located in Lincoln. The "Age" section of the profile was left blank, but in a miscellaneous section of the profile, it was stated that "92 is the year i was born."

Sexton testified that as "ljb92," on March 7, 2007, he had an online communication in a Nebraska chat room with a person using the screen name "lincolnpietaster." During the March 7 conversation, Sexton stated that "ljb92" was a 15-year-old female and "lincolnpietaster" responded by stating that "ljb92" was too young for him. Sexton testified at trial that after "lincolnpietaster" stated on March 7 that "ljb92" was too young for him, Sexton as "ljb92" responded, "Whatever." The conversation ended.

On June 1, 2007, Sexton was online under the "ljb92" screen name when he was contacted via instant messaging by a person using the screen name "lincolnpietaster." Sexton believed that the screen name contained a sexual innuendo referring to oral

sex. Pischel admitted at trial that he had communicated with "ljb92" using the screen name "lincolnpietaster" and that the name had a sexual innuendo that indicated he would like to perform oral sex on a woman.

The June 1, 2007, instant messaging conversation between Sexton as "ljb92" and Pischel as "lincolnpietaster" lasted approximately 3 hours, from shortly after noon until shortly before 3 p.m. While we would have preferred to paraphrase certain portions of such communications, the text of the communications is critical to the crime charged and to our analysis, and we therefore recite herein the actual words used by the parties to the communications, including grammatical errors.

Early in the conversation, "ljb92" sent a message asking, "asl?" which Sexton testified meant a request for the other person's age, sex, and location. Pischel identified himself as being "25 m," meaning a 25-year-old male. Sexton as "ljb92" responded with "15 f," indicating a 15-year-old female. Pischel asked "ljb92" for a picture, to which "ljb92" responded "u first." Pischel sent a picture of himself to "ljb92." Sexton sent Pischel pictures of a female officer from when she was 15 years old or younger.

The first part of the conversation involved general topics, but eventually Pischel asked "ljb92" whether she had any plans for the day and what she would like to do. Pischel told "ljb92" to "let me know if your ever looking for some fun" and "i'm always looking for pussy to eat." Sexton as "ljb92" responded "u really offering?" and Pischel responded "yeah, as long as your not a cop trying to bust me for sex with a minor." Sexton as "ljb92" denied being a police officer, and the conversation continued in this vein, with Pischel later stating, "but yeah if you want your pussy eaten, or more i'm offering" and "oh I'm cool if thats all you want . . . but i'll do anything else you want me to." Pischel asked "ljb92" "do you want to have sex, or do you want to give me oral, or do you just want to jack me off"; "ljb92" responded "how bout first 2."

Pischel then asked "so would you like me to come over?" and "ljb92" responded "not here," but asked whether he had a place to meet. Pischel proposed meeting at a restaurant; "ljb92" instead proposed meeting at Tierra Park near 27th

Street and Highway 2. Pischel told "ljb92" that he would be driving "a green ford contour." The two made tentative plans to meet that day, but Pischel later decided it would not work and said that another day might work better. The two exchanged telephone numbers; Sexton as "ljb92" gave Pischel a number that belonged to the Lincoln Police Department. After Pischel determined that a meeting would not work on June 1, 2007, Sexton as "ljb92" told Pischel "i'm kinna let down," "feel like i been stood up," and "i close to being pissed" and sent Pischel an emoticon expressing anger. We note that in *U.S. v. Cochran*, 534 F.3d 631, 632 n.1 (7th Cir. 2008), the court quoted a dictionary definition of "'emoticon'" as being "'a group of keyboard characters . . . that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications (as e-mail).'" The conversation, continued for some time with graphic sexual talk, and during the conversation, Pischel told "ljb92" that his name was "James" and that he lived near 14th Street and Old Cheney Road. The two eventually ended the conversation by making plans for another online chat the next Monday, June 4.

At approximately 9:40 a.m. on June 4, 2007, "lincolnpietaster" initiated an instant messaging conversation with "ljb92." The conversation began with general topics but after 20 minutes, Pischel as "lincolnpietaster" said "maybe you should invite me over to eat you." Sexton as "ljb92" agreed that they could meet at the park they had discussed in the earlier conversation. Pischel stated he could meet "ljb92" at the park in 10 minutes and would be in a green car. Pischel ended the conversation at approximately 10:40 a.m., stating "see you soon."

During the June 4, 2007, conversation, Sexton realized a meeting was being set up and began making arrangements to have officers at Tierra Park. Between the June 1 and 4 conversations, Sexton and fellow investigators had discovered information about Pischel. Using the telephone number and other information Pischel gave in the June 1 conversation, investigators determined where Pischel lived. Investigators identified Pischel by comparing the picture he sent to "ljb92" to his

driver's license photograph obtained from the Department of Motor Vehicles. Investigators also matched the description Pischel gave of his car to motor vehicle records for a car owned by Pischel.

An officer was observing Pischel's residence on the morning of June 4, 2007, and at approximately 10:45 a.m., the officer informed investigators stationed near Tierra Park that Pischel had left his residence and was headed toward the park. Officers observed Pischel's vehicle arrive and briefly park on a street adjacent to Tierra Park. Pischel began to drive away from the park but then turned back toward the park. Investigators asked an officer in a marked police cruiser to make a traffic stop of Pischel's vehicle. After stopping the vehicle, officers removed Pischel from the vehicle, arrested him, placed him in handcuffs, and placed him in the back of the police cruiser. Officers conducted a search of Pischel's vehicle and found two condoms in the console between the driver's seat and the passenger seat.

Sexton arrived at the scene after the officers had begun searching Pischel's vehicle. Pischel consented to a search of his home, and Sexton conducted the search. Sexton found a computer in the home and brought it to the police department for a search, which uncovered copies of the photographs that "ljb92" had sent to "lincolnpietaster" and information which indicated that the photograph files had been created on June 1, 2007, and accessed on June 4. The search also revealed a copy of the profile Sexton had created for "ljb92" and a copy of the photograph that Pischel had sent to "ljb92."

On July 9, 2007, the State charged Pischel with a violation of § 28-320.02. Prior to trial, Pischel moved to suppress the evidence obtained in the June 4 search of his vehicle. At the suppression hearing, Sandra Myers, an officer with the technical investigations unit, testified regarding the investigation that led up to the stakeout of Tierra Park and Pischel's arrest. Myers testified regarding Sexton's online conversations with Pischel and the investigation which identified Pischel as the person using the screen name "lincolnpietaster." Myers testified that investigators discovered that Pischel had an outstanding arrest warrant on a misdemeanor theft charge.

Michael J. Schmidt, the uniformed officer who stopped Pischel's vehicle, testified at the suppression hearing that he did so at the direction of Myers and that when he stopped the vehicle, he told Pischel he was under arrest pursuant to an outstanding warrant. Schmidt searched Pischel and found nothing of concern. Corey L. Weinmaster, one of the officers who searched Pischel's vehicle, testified that after Schmidt arrested Pischel and took Pischel to his cruiser, Weinmaster and another officer approached Pischel's vehicle to ensure no one else was inside. They then searched the passenger compartment of the vehicle and containers inside the passenger compartment, including a center console between the driver's seat and passenger seat. In the console, they found two wrapped condoms. The officers seized the condoms but did not seize any other evidence from the vehicle. Weinmaster testified that he did not have a search warrant for the vehicle. Following the suppression hearing, the court overruled Pischel's motion. At trial, over Pischel's objection, the court admitted into evidence the condoms found in the search.

At trial, the court admitted into evidence printed transcripts of the two online conversations between "ljb92" and "lincolnpietaster" that occurred on June 1 and 4, 2007. Over Pischel's objection, the court allowed the jury access to the transcripts during deliberations. The court reasoned that the transcripts were not testimony but instead were evidence of the crime itself.

Pischel testified in his own defense. He admitted that he took part in the online chats with "ljb92" and that "ljb92" claimed to be a 15-year-old female; however, he testified that he did not believe that "ljb92" was under 16 years of age, because of various things the two had discussed and because the June 1, 2007, chat took place at a time when a 15-year-old would have been in school. Pischel testified that he thought "ljb92" was a woman in her late teens or early twenties who was merely interested in role-playing as a 15-year-old and that he did not question her age because he did not want "to break that role-play and risk not talking to her again."

Pischel testified that during the chats, he had lied about his own age, saying he was 25 when he was actually 30. Pischel

testified that he was not interested in having sexual relations with a girl under 18 and that he had no interest in child pornography. He stated that he went to the park on June 4, 2007, hoping to meet a woman over the age of 18.

On cross-examination, Pischel admitted that he initiated the online conversations with "ljb92" on June 1 and 4, 2007; that he initiated the discussions of sexual behavior; that when he wrote to "ljb92" stating, "'I'm always looking for pussy to eat,'" it was not in response to any solicitation for sex on the part of "ljb92"; and that his intent in arranging times and places with "ljb92" was to meet "ljb92" and to engage in the sexual acts he had offered.

Pischel requested an instruction on the affirmative defense of entrapment. The court concluded that there was "not more than a scintilla of evidence" to support the instruction and refused the instruction.

The jury found Pischel guilty of violating § 28-320.02. The district court thereafter sentenced Pischel to imprisonment for 1 to 2 years.

Pischel appeals his conviction.

ASSIGNMENTS OF ERROR

Pischel asserts that there was not sufficient evidence to support his conviction. Pischel also asserts that the district court erred in (1) overruling his motion to suppress evidence obtained in the search of his vehicle, (2) refusing his requested instruction on entrapment, and (3) allowing the jury access to the written transcripts of online conversations during deliberations.

STANDARDS OF REVIEW

[1,2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008). An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses,

or reweigh the evidence. Such matters are for the finder of fact. *Id*.

[3] In reviewing a trial court's ruling on a motion to suppress based on the Fourth Amendment, we will uphold its findings of fact unless they are clearly erroneous. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). But we review de novo the trial court's ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search. *Id*.

[4] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

ANALYSIS

The Evidence Was Sufficient to Support Pischel's Conviction.

Pischel was charged under § 28-320.02 which provides:

> No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer . . . to engage in an act which would be in violation of section 28-319 . . . .

Under Neb. Rev. Stat. § 28-319 (Reissue 2008), "Any person who subjects another person to sexual penetration . . . when the actor is nineteen years of age or older and the victim is . . . less than sixteen years of age is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-318(6) (Reissue 2008) defines "[s]exual penetration" to include "sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body . . . into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes."

Pischel asserts that there was not sufficient evidence to support his conviction for use of a computer to entice a child for sexual purposes or, more specifically in this case, to entice a peace officer who is believed by the defendant to be a child 16 years of age or younger. We conclude that the evidence was sufficient to support the conviction.

The main pieces of evidence supporting Pischel's conviction were the transcripts of the online conversations between Pischel and Sexton posing as "ljb92." Such transcripts provided evidence that Pischel used a computer to communicate with a person using the screen name "ljb92," who Pischel was told was a 15-year-old girl. The transcripts further showed that Pischel offered to perform cunnilingus on "ljb92," asked whether "ljb92" wanted to have sexual intercourse with him and perform fellatio on him, suggested that the two meet to engage in such activities, and made arrangements to meet with "ljb92." In order to prove that Pischel was the person using the screen name "lincolnpietaster" to communicate with "ljb92," the State presented evidence that Pischel arrived at the time and location arranged for a meeting between "lincolnpietaster" and "ljb92." In addition to the evidence presented by the State, in his testimony offered in his defense, Pischel admitted that he took part in online conversations with "ljb92" using the screen name "lincolnpietaster," that he initiated such conversations, and that he initiated discussions of sexual behavior.

Such evidence was sufficient to support a conviction under § 28-320.02. From such evidence the jury, as a rational trier of facts, could have found that Pischel used a computer to communicate with a police officer posing as a child 16 years of age or younger and that during such conversation, Pischel solicited, coaxed, enticed, or lured such person to engage in acts of cunnilingus, fellatio, and sexual intercourse and that such acts, when performed with a person less than 16 years of age, would have been in violation of § 28-319. In addition, as discussed below, the jury could rationally have found that Pischel believed that the person with whom he communicated was a child 16 years of age or younger.

Section 28-320.02, of which Pischel stands convicted, requires, inter alia, that when the individual with whom he or she is corresponding is a peace officer, the defendant believe that the individual with whom he or she is corresponding is a child 16 years of age or younger. Pischel argues that the evidence was insufficient to establish that he actually believed that "ljb92" was a 15-year-old girl. In this regard, he refers us to his testimony at trial that he did not believe "ljb92" was really a 15-year-old girl and that instead, he believed that "ljb92" was an adult woman who was role-playing as a 15-year-old. He also refers us to the online conversations where he points out that although he was offering to have sexual relations with "ljb92," he also indicated he did not want to meet if "ljb92" was "a cop trying to bust me for sex with a minor."

In contrast, the State notes that there was evidence that during the conversations, "ljb92" stated that "she" was 15 years old, that "ljb92" sent Pischel a picture of a girl who was 15 years old or younger and told Pischel that it was a picture of "ljb92," and that Pischel's computer contained the profile created for "ljb92" which indicated that "ljb92" was born in 1992. It is for the jury to assess the credibility of witnesses, see *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008), and the evidence noted by the State was sufficient to give the jury a basis to find that, contrary to Pischel's testimony, Pischel actually believed that "ljb92" was a child 16 years of age or younger.

The evidence in this case was sufficient for the jury to find Pischel guilty of violating § 28-320.02. We therefore reject Pischel's first assignment of error.

Whether or Not the Court Erred in Overruling the Motion to Suppress, the Admission of the Evidence Found in the Search Was Harmless Error.

Pischel next asserts that the court erred in overruling his motion to suppress evidence obtained in the search of his vehicle and in admitting such evidence at trial. We conclude that the guilty verdict in this case was surely unattributable to evidence obtained in the search and that, therefore, any

error with regard to the admission of such evidence was harmless error.

[5] In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error. *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

Pischel's motion to suppress related to the search of his vehicle. The only pieces of evidence obtained from the search and admitted into evidence were two condoms found in the center console. As we concluded above, there was sufficient evidence to support Pischel's conviction. The crime with which Pischel was charged was soliciting, enticing, coaxing, or luring "ljb92" to engage in sexual activity. The crime occurred during the online conversations between Pischel and "ljb92" and was completed before Pischel arrived for the meeting in the park. The evidence showing that Pischel brought condoms to the meeting was not necessary to support a conviction and was of minor interest to the computer-based crime charged. The verdict in this case was surely unattributable to such evidence.

Because the verdict was surely unattributable to evidence obtained from the search of Pischel's vehicle, any error in the admission of such evidence was harmless error and would not support a reversal of Pischel's conviction. We therefore reject this assignment of error.

There Was No Evidence to Support an Instruction on Entrapment.

Pischel next asserts that the district court erred by refusing his requested instruction on entrapment. We conclude that there was no evidence to raise the defense and that therefore, the court did not err in refusing the instruction.

[6-9] When a defendant raises the defense of entrapment, the trial court must determine, as a matter of law, whether the defendant has presented sufficient evidence to warrant a jury instruction on entrapment. *State v. Byrd*, 231 Neb. 231, 435

N.W.2d 898 (1989). In Nebraska, entrapment is an affirmative defense consisting of two elements: (1) the government induced the defendant to commit the offense charged and (2) the defendant's predisposition to commit the criminal act was such that the defendant was not otherwise ready and willing to commit the offense. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). The burden of going forward with evidence of government inducement is on the defendant. *Id*. In assessing whether the defendant has satisfied this burden, the initial duty of the court is to determine whether there is sufficient evidence that the government has induced the defendant to commit a crime. *Id*. This determination is made as a matter of law, and the defendant's evidence of inducement need be only more than a scintilla to satisfy his or her initial burden. *Id*. A defendant need not present evidence of entrapment; he or she can point to such evidence in the government's case in chief or extract it from the cross-examination of the government's witnesses. *Id*.

[10,11] In determining whether the court in this case erred in refusing the entrapment instruction, we must review whether Pischel satisfied his initial burden of demonstrating that there was more than a scintilla of evidence of inducement. Inducement can be any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promise of reward, or pleas based on need, sympathy, or friendship. *Id*. Inducement requires something more than that a government agent or informant suggested the crime and provided the occasion for it. *Id*. Inducement consists of an opportunity plus something else, such as excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, noncriminal type of motive. *Id*.

In prior cases, we have found sufficient evidence of inducement when the State went beyond simply providing the defendant with an opportunity to violate the law. In both *State v. Canaday*, *supra*, and *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001), the defendant was convicted of conspiracy

to commit first degree sexual assault on a child. In both *Canaday* and *Heitman*, the defendant demonstrated more than a scintilla of evidence of inducement. In *Canaday*, we noted evidence that the defendant initially responded to advertisements that State agents, posing as a fictitious mother, had placed in an adult magazine seeking a "'man who likes kids and understands needs.'" 263 Neb. at 568, 641 N.W.2d at 17. We noted further evidence that State agents made the initial references to children and to "'special education'" of such children regarding sexual matters, that State agents repeatedly reinforced the fictitious mother's eagerness for the defendant to become involved with her children, and that the State agents played on the defendant's emotions and desires. *Id*. at 569, 641 N.W.2d at 18. In *Heitman*, the defendant initiated contact with a 14-year-old girl by giving her, inter alia, a sexually suggestive letter and his e-mail address. Thereafter, police, posing as the girl, initiated a correspondence with the defendant and sent the defendant "numerous e-mail messages aimed at affecting his emotions and desires." 262 Neb. at 200, 629 N.W.2d at 555. In the messages, police indicated that the girl wanted the defendant "to be her sexual teacher," *id.*, and encouraged him to write descriptions of how he would engage in sexual activity with her. We noted that "[o]f most importance" was evidence it was the police posing as the girl "who first suggested meeting at the motel" and who "created a sense of urgency for the meeting to occur." 262 Neb. at 201, 629 N.W.2d at 555. We determined in *Heitman* that "the State went beyond merely providing an opportunity to commit the crime, but instead encouraged [the defendant] to respond to [the] e-mail messages in a sexual manner and urged him to continue to think of [the girl] sexually." *Id*.

The sort of evidence of inducement that was present in *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002), and *State v. Heitman*, *supra*, was not present in this case. Instead, the evidence presented by the State and Pischel's own admissions during his testimony indicate that the online conversations between Pischel and "ljb92" were initiated by Pischel and that discussions of sexual activity were initiated by Pischel. The

evidence indicates that it was Pischel who first proposed the possibility of the two engaging in sexual activity and that he initiated discussions to arrange a time and place for the two to meet. The evidence of activity by agents of the State in this case was that Sexton merely created a profile, was present in a chat room, and responded to communications—including sexual communications initiated by Pischel. The communications by Sexton as "ljb92," including the associated emoticons, did not legally amount to inducement. The State merely created the opportunity for Pischel to communicate with a person described as a 15-year-old girl and to take such communication in a sexual direction.

Pischel argues that agents of the State played on his emotions and refers us to the end of the March 7 and June 1, 2007, conversations. On March 7, Pischel ended the brief online conversation with "ljb92" after being told that "ljb92" was less than 16 years of age. There was evidence that at the end of the March conversation, "ljb92" merely indicated "Whatever" and did not thereafter attempt to revive the conversation. The two did not converse again until June, and such conversation was initiated by Pischel.

With respect to the June 1, 2007, exchange, the evidence shows that after Pischel indicated to "ljb92" that it would not work for the two to meet that day, "ljb92" replied that "she" was "kinna let down" and was "close to being pissed" and sent an emoticon expressing anger. We note that although "ljb92" expressed some disappointment, such expressions were not persistent and that it was Pischel, not "ljb92," who initiated plans for the two to meet on June 4. We determine that such evidence does not indicate that the State was playing on Pischel's emotions to induce him into criminal activity and that the district court did not err as a matter of law when it concluded there was "not more than a scintilla of evidence" of inducement.

We conclude that because there was not evidence of inducement, the district court did not err in refusing Pischel's requested instruction on the affirmative defense of entrapment. We reject this assignment of error.

Transcripts of Online Conversations Were Substantive Evidence of the Crime, and the Court Did Not Err in Allowing the Jury Access to the Transcripts During Deliberations.

Pischel finally asserts that the court erred in allowing the jury access during deliberations to the transcripts of his online conversations with "ljb92." We conclude that the transcripts were not testimony but instead were substantive evidence of the crime charged and that, therefore, it was not error for the court to allow the jury access to the transcripts during deliberations.

At trial, the court admitted into evidence the transcripts that Sexton printed of the two conversations between "ljb92" and "lincolnpietaster" that occurred on June 1 and 4, 2007. Over Pischel's objection, the court allowed the jury access to the transcripts during deliberations. The court determined that the transcripts were not testimonial in nature but instead were evidence of the crime itself.

[12,13] Pischel cites *State v. Dixon*, 259 Neb. 976, 987, 614 N.W.2d 288, 297 (2000), in which we noted the traditional common-law rule, from which we "do not ordinarily stray," that a trial court has no discretion to submit testimonial materials to the jury for unsupervised review during deliberations. However, in a partial concurrence and partial dissent in *Dixon*, it was noted that a trial court has broad discretion in deciding whether to submit nontestimonial exhibits to the jury during its deliberations. *Id.* (Stephan, J., concurring in part, and in part dissenting) (citing *Chambers v. State*, 726 P.2d 1269 (Wyo. 1986)). In particular, trial courts have broad discretion in allowing the jury to have unlimited access to properly received exhibits that constitute substantive evidence of the defendant's guilt. *Id.* (citing *U.S. v. Puerta Restrepo*, 814 F.2d 1236 (7th Cir. 1987); *State v. Castellanos*, 132 Wash. 2d 94, 935 P.2d 1353 (1997); *Pino v. State*, 849 P.2d 716 (Wyo. 1993); *State v. Halvorson*, 346 N.W.2d 704 (N.D. 1984); and *State v. Barbo*, 339 N.W.2d 905 (Minn. 1983)).

We agree with the district court's determination that the transcripts of online conservations were not testimonial material

but instead were substantive evidence of Pischel's guilt. The online conversations and Pischel's statements therein were evidence of the elements of the crime of use of a computer to entice a child or peace officer believed to be a child for sexual purposes; therefore, the transcripts of such conversations were substantive evidence of the crime charged.

Because the transcripts were not testimony but instead substantive evidence of the crime charged, the court had broad discretion to allow the jury access to such evidence during deliberations. We conclude that the court did not abuse its discretion by allowing such access, and we reject Pischel's final assignment of error.

CONCLUSION

We conclude that any error in the admission of evidence obtained in the search of Pischel's vehicle was harmless error. We further conclude that the district court did not err in refusing Pischel's requested instruction on entrapment, nor did the court err in allowing the jury access to the written transcripts of the online conversations. We finally conclude that there was sufficient evidence to support Pischel's conviction. We therefore affirm Pischel's conviction and sentence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAMIEN D. WATKINS, APPELLANT.
762 N.W.2d 589

Filed March 20, 2009. No. S-08-712.

1. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

3. **Effectiveness of Counsel: Appeal and Error.** When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective.
4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Pleas.** Generally, in order to support a finding that a plea of guilty has been entered freely, voluntarily, and intelligently, the court must, inter alia, inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.
6. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Thomas M. Rowen for appellant.

Jon Bruning, Attorney General, George R. Love, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Damien D. Watkins pled guilty to an amended charge of second degree murder and was sentenced to 40 years to life in prison. His direct appeal was summarily affirmed, and he then filed this postconviction proceeding, alleging that he was denied his constitutional rights due to the ineffective assistance of trial and appellate counsel. After conducting an evidentiary hearing, the district court denied postconviction relief. Watkins appeals from that order. We affirm.

FACTS

Watkins was originally charged with first degree murder and use of a deadly weapon to commit a felony in connection with the death of Jesus Covarrubias. The State's theory was that Watkins and Michael Glover agreed to rob

Covarrubias and that Glover killed Covarrubias during the robbery. Watkins eventually agreed to testify against Glover, and the State agreed to charge Watkins with one count of second degree murder.

Watkins pled guilty to an amended charge of second degree murder. He was represented by counsel at the time of the plea. Before accepting the guilty plea, the court advised Watkins in open court, inter alia, of the following:

> You have a right to a speedy public trial to a jury in this case. And in order to be convicted, a jury of 12 people would have to unanimously, that means all of them, agree that the prosecutor has proven you guilty beyond a reasonable doubt.
>
> If you were to have a trial, you and your attorney would have the right to confront and cross-examine all of the witnesses that the State would call to testify against you at the trial.
>
> If you were to have a trial, you could call witnesses to testify for you in your defense at the trial, and you would have available to you the subpoena power of the Court, which means that the Court would order to be here at court expense, if necessary, any witness that you would want to have here to testify for you on your behalf at the trial.
>
> If you were to have a trial, you could testify yourself as a witness in your own defense, but you can't be compelled to make any statements against your interests in the trial, you can't be compelled to offer any evidence at all in the trial, and you can't be compelled to testify as a witness at the trial.
>
> And if you chose not to testify as a witness at your trial, the prosecutor couldn't comment on that to the jury in the trial of your case or use that in any way against you in your trial.
>
> If you were to have a trial, I would tell the jury that you are presumed to be innocent until proven guilty.
>
> Do you understand that if you plead guilty, you waive your right to trial and you waive all of these other rights that go along with your right to trial?

Watkins responded affirmatively. It is undisputed that the court did not expressly advise Watkins that he had a right to have counsel represent him if he chose to go to trial.

The plea agreement between Watkins and the State is not in the record. Watkins testified in the postconviction proceeding that he understood he would receive a sentence of 20 to 25 years in prison for second degree murder in return for his testimony against Glover and that the State would inform the court of his cooperation. The attorney who represented Watkins at the time of his plea, however, testified that the State agreed to inform the court that it would make no public or private objection to a sentence of 20 years, but refused to go into open court and recommend such a sentence. Trial counsel further testified that the State also agreed to inform the court of Watkins' cooperation. Counsel testified that the State did not agree to remain silent at Watkins' sentencing and that there was no guarantee that Watkins would receive a sentence of 20 to 25 years in prison.

Watkins' trial counsel wrote a letter to the judge requesting a sentence of 20 to 25 years in prison. The letter highlighted Watkins' cooperation in the case and minimized his participation in the murder. At the sentencing hearing on February 4, 2005, Watkins' counsel again stressed these issues. When asked to comment, the prosecutor stated: "[T]he State would agree that some consideration should be given for the fact that [Watkins] was willing to testify against his co-defendant. However, this is a very serious crime and we would ask that you treat it with the proper respect that it has due." Prior to announcing the sentence, the court noted that it had been informed by the prosecutor of Watkins' cooperation. The court also noted Watkins' extensive criminal history and the fact that the crime was originally charged as first degree murder. Taking into consideration Watkins' cooperation, but also the nature of his offense and his history of violent criminal offenses, the court imposed a sentence of 40 years to life in prison. A written sentencing order was filed on February 7.

On February 18, 2005, Watkins filed a motion to withdraw his guilty plea. In this motion, he contended that the comments made by the prosecutor at the sentencing hearing violated the

plea agreement and that had he known the comments would be made, Watson would not have agreed to plead guilty. However, on February 25, before the motion to withdraw the plea was ruled upon, Watkins filed a pro se notice of appeal from the conviction and sentencing. On March 1, Watkins and his trial counsel appeared in the district court and trial counsel was given leave to withdraw. The court's trial docket reflects that Watkins' motion to withdraw his plea was denied on that date without an evidentiary hearing, and a written order to this effect was filed on March 7. An order appointing appellate counsel was filed on March 8.

Watkins' newly appointed appellate counsel filed a brief assigning one error: "The District Court erred in denying [Watkins'] Motion to Withdraw Plea in the absence of an evidentiary hearing." On November 16, 2005, in our case No. S-05-271, we granted the State's motion for summary affirmance, because Watkins' notice of appeal was filed prior to the district court's ruling on the motion to withdraw the plea and, thus, the sole issue assigned in the appellate brief was not properly before us.

Watkins filed his verified motion for postconviction relief on September 14, 2006. The motion alleged, summarized and restated, that his guilty plea was not knowingly, intelligently, and voluntarily made because he was not informed of his right to counsel if he chose to go to trial; that his trial counsel was ineffective for failing to object to the prosecutor's comments at the sentencing hearing; and that his appellate counsel was ineffective for failing to raise these issues on direct appeal. After conducting an evidentiary hearing, the district court denied postconviction relief. Watkins filed this timely appeal.

ASSIGNMENTS OF ERROR

Watkins assigns, restated, that (1) trial counsel was ineffective in failing to object to the prosecutor's statement at sentencing and in failing to properly advise Watkins of the potential sentence he faced, (2) appellate counsel was ineffective in failing to raise all appealable issues, (3) the district court erred in failing to advise Watkins of his right to counsel before

accepting his guilty plea, and (4) the district court erred in denying Watkins' motion to withdraw his guilty plea without conducting an evidentiary hearing.

STANDARD OF REVIEW

[1] On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.[1]

ANALYSIS

[2,3] Watkins contends that the district court in the postconviction proceeding erred in concluding that he was not deprived of his constitutional right to effective assistance of trial and appellate counsel. The principles applicable to this issue are well established. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[2] When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective.[3]

Guilty Plea

[4] Watkins contends that his appellate counsel was ineffective in failing to challenge the validity of his guilty plea on direct appeal. He contends that appellate counsel should have assigned and argued that the district court failed to inform him that if he chose to go to trial, he had the right to be represented by counsel. Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, in a postconviction

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[1] *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007); *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

[2] *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008); *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

[3] See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[4] Assuming without deciding that the issue is not waived under the unusual circumstances of this case, we reach it.

[5] Generally, in order to support a finding that a plea of guilty has been entered freely, voluntarily, and intelligently, the court must, inter alia, inform the defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.[5] The record reflects that Watkins was not expressly informed of his right to counsel if he chose to go to trial. However, as the district court correctly concluded, this failure does not render the plea invalid where, as here, the record also reflects that the defendant was actually represented by counsel at the time of the guilty plea and during prior proceedings. As we noted in *State v. Neal*[6]: "To hold that it is error upon a court's failure to inform a defendant of his right to counsel when a defendant has the benefit of counsel before the court and acknowledges that his counsel's representation has been satisfactory would be the epitome of slavish technicality." Relying upon *Neal*, we held in *State v. Mindrup*[7] that a court's failure to inform a represented defendant of her right to counsel did not invalidate a guilty plea, regardless of whether the defendant expressed satisfaction with counsel's representation.

Watkins was accompanied by his appointed counsel when he entered his guilty plea. He acknowledged on the record that he had sufficient time to discuss the plea agreement with counsel and that he was satisfied with counsel's efforts on his behalf. Trial counsel later testified that he had no reason to believe that Watkins' guilty plea was not freely, intelligently,

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[4] *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[5] See, *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[6] *State v. Neal*, 216 Neb. 709, 712, 346 N.W.2d 218, 220 (1984).

[7] *State v. Mindrup*, 221 Neb. 773, 380 N.W.2d 637 (1986).

and voluntarily made. On this record, there is no basis for challenging the validity of Watkins' guilty plea. Accordingly, the fact that the issue was not raised on appeal cannot be deemed deficient performance on the part of Watkins' appellate counsel or prejudicial to Watkins.

Sentencing

Watkins argues that his trial counsel was constitutionally ineffective in failing to object to the prosecutor's comments during sentencing as being in violation of the plea agreement and that his appellate counsel was ineffective in failing to raise this issue on appeal. This claim rests upon Watkins' postconviction allegation that as part of the plea agreement, he was "promised a minimum sentence in the range of 20-30 years" and that the prosecutor further promised "to make no further comment regarding sentencing."

The district court made a factual determination from the record that Watkins received no promise with respect to sentencing. The record reflects that before accepting Watkins' plea, the court asked if he understood that by pleading guilty, he would subject himself to the maximum penalty of life imprisonment. Watkins answered, "Yeah." Immediately thereafter, the court asked, "Has anybody told you or led you to believe that if you pled guilty today that you'd be given probation or some sort of light sentence or be in any way rewarded in exchange for agreeing to plead guilty in this case?" Watkins answered, "No." Watkins' trial counsel testified that he advised Watkins that while 20 years in prison was the minimum sentence he could receive, there was "no guarantee" with respect to the actual sentence. Based upon this evidence, the district court's finding that Watkins was not promised a sentence of 20 to 30 years' imprisonment in exchange for his plea is not clearly erroneous.

Nor does the record support Watkins' claim that his trial counsel was ineffective in not objecting to the prosecutor's comments at the sentencing hearing or that his appellate counsel was ineffective in failing to raise this issue on appeal. There was no agreement that the prosecutor would "remain silent" at sentencing. The prosecutor agreed to inform the court of

Watkins' cooperation and not to object to his request for a minimum sentence. Watkins' trial counsel testified that while he believed the prosecutor's comments may have violated the "spirit" of the plea agreement, they did not constitute an actual violation. The record supports the district court's implicit finding that the prosecutor's comments did not violate the plea agreement, and accordingly, there is no basis for Watkins' claim that his lawyers were ineffective for failing to advocate otherwise.

Attempt to Withdraw Plea

[6] Finally, Watkins argues that the district court violated his right to counsel when it did not appoint new counsel at the hearing on his motion to withdraw his plea. However, this claim was not asserted in Watkins' verified motion for postconviction relief and it was not addressed by the district court in its disposition of that motion. We decline to reach the issue, based upon the principle that an appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.[8]

CONCLUSION

Finding no error, we affirm the judgment of the district court denying postconviction relief.

Affirmed.

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[8] *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Julianne Dunn Herzog, respondent.

762 N.W.2d 608

Filed March 27, 2009. No. S-08-012.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court

reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the Nebraska Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.

2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
5. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Julianne Dunn Herzog, pro se.

David A. Domina and Eileen Reilly Buzzello, of Domina Law Group, P.C., L.L.O., on brief, for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Julianne Dunn Herzog (Herzog). After a formal hearing, the referee concluded that Herzog had violated the Nebraska Rules of Professional Conduct and recommended a public reprimand and probation for 1 year. We conclude there was clear and convincing evidence that Herzog violated the Rules of Professional Conduct and, accordingly, suspend her from the practice of law for 3 months, followed by probation for a period of 1 year.

FACTUAL BACKGROUND

Herzog was licensed to practice law on July 2, 1976. In July 1996, Herzog married David Herzog. Since shortly after their

marriage, Herzog and David have practiced law together as Herzog & Herzog, P.C. Herzog is an employee of that corporation; David is its sole shareholder.

This disciplinary action against Herzog involves a family dispute among the children of Dale and Rosemary Dunn regarding guardianship-conservatorship proceedings filed with respect to Rosemary. Primarily, the dispute was between Herzog, a Nebraska attorney practicing in the Omaha, Nebraska, area, on one side, and Herzog's siblings on the other side. A brief review of the facts of the underlying dispute reveals that Herzog's siblings were concerned about Rosemary's ability to care for herself and were interested in appointing a guardian for her. Herzog was initially opposed to this plan; she eventually agreed to the need for a guardian and conservator for Rosemary but disagreed with her siblings about virtually everything related to the guardianship-conservatorship.

A brief recitation of the relevant proceedings is helpful. On December 29, 2004, Herzog's sister, Mary Elizabeth Dunn, filed a petition for the appointment of a guardian and conservator for Rosemary. The next day, Mary Elizabeth was appointed Rosemary's temporary guardian and conservator. On January 7, 2005, over the objections of her siblings, Herzog entered an appearance on Rosemary's behalf. On January 14, Herzog's brother, D. Eugene Dunn, was appointed Rosemary's temporary guardian. Fremont National Bank & Trust Company was appointed Rosemary's conservator. Then on February 23, a guardian ad litem was appointed to represent Rosemary's interests. On November 21, another of Herzog's brothers, Daniel Dunn, was appointed Rosemary's guardian. Daniel served in that capacity at the time of the disciplinary hearing in this case. Fremont National Bank & Trust Company also continued to act as Rosemary's conservator at the time of the hearing.

On December 19, 2005, Herzog filed a notice of appeal, purportedly on Rosemary's behalf. That notice of appeal was from the order appointing Daniel as guardian. On this same date, Herzog and her husband David, who had since entered an appearance on Rosemary's behalf, filed a motion with the county court asking for leave to withdraw. This motion was granted on December 27.

Despite the granting of the motion to withdraw, on March 10, 2006, Herzog filed a "Notice of Appearance" in the county court. In that notice, Herzog indicated that she continued to represent Rosemary's interests. On April 21, Herzog filed various motions with the county court asking that the guardian ad litem, conservator, and guardian all be removed for various acts of misfeasance and malfeasance. A pretrial conference was held on April 21. At the conference, the county court struck all Herzog's motions for the reason that Herzog had withdrawn and no longer represented Rosemary's interests. Herzog was granted leave to file the motions in her individual capacity. Herzog later filed, in her own behalf, a motion to adopt the prior motions; the motions asking for the removal of the guardian ad litem, conservator, and guardian were subsequently denied.

On May 1, 2006, a complaint was filed against Herzog before the Committee on Inquiry of the Second Disciplinary District. That complaint was related to Herzog's action in the guardianship proceedings. Herzog stipulated to a private reprimand, which was issued on November 21.

On July 28, 2006, Herzog filed with the county court a notice of appeal, both in her own behalf and on Rosemary's behalf. Herzog purported to appeal from all "final orders" of the county court which occurred during the time she represented Rosemary—January 7 to December 28, 2005. This appeal was eventually dismissed for lack of jurisdiction. After that dismissal, David filed, at Herzog's direction, a petition for further review of the dismissal.

Herzog filed another notice of appeal on February 12, 2007, again both in her own behalf and on Rosemary's behalf. This notice appealed all rulings made between December 2004 and January 10, 2007, and again noted that Herzog was Rosemary's counsel from January to December 2005.

The Counsel for Discipline filed formal charges against Herzog on January 2, 2008, for actions relating to Rosemary's guardianship proceedings. The Counsel for Discipline alleged that Herzog's actions in the following particulars were misconduct in violation of the Nebraska Rules of Professional Conduct:

• Herzog's July 28, 2006, notice of appeal alleging that notice was filed by Rosemary through Herzog as counsel, because at the time Herzog filed the notice, she was not authorized to do so by Rosemary or by Rosemary's guardian;

• Herzog's February 22, 2007, petition for further review filed with this court from the Court of Appeals' dismissal of the July 28, 2006, appeal for lack of jurisdiction;

• Herzog's February 12, 2007, notice of appeal alleging that notice was filed by Rosemary "by and through [Herzog] her counsel from January, 2005, to December, 2005," because at the time Herzog filed the notice, she was not authorized to do so by Rosemary or by Rosemary's guardian.

The Counsel for Discipline alleges that the above filings were in violation of Neb. Rev. Stat. § 7-104 (Reissue 2007) (oath of office as attorney) and of Neb. Ct. R. of Prof. Cond. § 3-503.1 (meritorious claims and contentions); § 3-503.2 (expediting litigation); § 3-503.3(a)(1) (candor toward tribunal); and § 3-508.4(a) (violation of disciplinary rule), § 3-508.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and § 3-508.4(d) (conduct prejudicial to administration of justice).

A disciplinary hearing was held. The referee filed his report following that hearing. In the report, the referee found that Herzog had violated §§ 3-503.2 and 3-508.4(a) and (d). The referee specifically found that Herzog's conduct did not violate §§ 3-503.1, 3-503.3(a)(1), or 3-508.4(c). The referee made no finding as to whether Herzog violated § 7-104. The referee recommended that Herzog be publicly reprimanded and that her license be placed on a probationary status for 1 year. Herzog filed exceptions to the referee's report, and the Counsel for Discipline filed cross-exceptions.

ASSIGNMENTS OF ERROR

On appeal, Herzog argues that the referee erred by (1) considering evidence of events prior to May 2006 to evaluate Herzog's guilt with respect to the formal charges, (2) considering in this disciplinary action Herzog's previous private reprimand for different conduct in the same guardianship proceeding, (3) finding that Herzog endeavored to "control"

Rosemary's person and property and used legal processes to accomplish this goal, and (4) finding that Herzog violated §§ 3-503.2 and 3-508.4(a) and (d).

The Counsel for Discipline argues that the referee erred by not finding that Herzog violated §§ 3-503.1, 3-503.3(a)(1), and 3-508.4(c) and in imposing a sanction of a public reprimand with probation.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[1]

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence.[2]

ANALYSIS

As an initial matter, though Herzog argues that the referee erred in various respects, three of those contentions are without merit, given this court's standard of review. Because we review disciplinary proceedings de novo on the record, whatever the referee might have improperly considered is immaterial to our review.

We are therefore generally presented with two issues on appeal: (1) what provisions of the Nebraska Rules of Professional Conduct, if any, were violated and (2) the appropriate sanction for such violations.

HERZOG'S EXCEPTIONS: § 3-503.2

We first address Herzog's argument that the referee erred in finding that she violated § 3-503.2. Section 3-503.2 deals with expediting litigation and provides:

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[1] *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004).

[2] See *id.*

> In the lawyer's representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

With regard to § 3-503.2, the referee concluded that "filing an appeal on behalf of someone no longer legally one's client in and of itself violates [the rule]."

We agree with the referee that there is clear and convincing evidence that Herzog's actions violated § 3-503.2. At the time Herzog filed the two notices of appeal on July 28, 2006, and February 12, 2007, and directed David to file the petition for further review on February 22, Herzog had already been granted leave to withdraw as counsel for Rosemary. To the extent there is a question about whether Herzog represented Rosemary pending the filing of any notice that she, Herzog, actually had withdrawn as counsel, we note that by April 21, 2006, when she filed several motions before the county court, Herzog was aware that the county court no longer considered her counsel for Rosemary. And a review of the notices of appeal themselves further demonstrates that Herzog was aware that she was no longer representing Rosemary, as these notices contain language limiting them to time periods in which she had been Rosemary's counsel of record.

It is clear from a review of the record that by the time Herzog filed the first notice of appeal on July 28, 2006, she was aware that she no longer represented Rosemary. We therefore agree with the referee that Herzog was purporting to act as counsel for someone who was not her client and that such was a violation of § 3-503.2.

Herzog's Exceptions: § 3-508.4(a) and (d)

We next turn our attention to Herzog's contention that her conduct was not a violation of § 3-508.4(a) and (d). Section 3-508.4 provides in relevant part: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another [and]

(d) engage in conduct that is prejudicial to the administration of justice."

Again, we agree with the referee that Herzog violated § 3-508.4(a) by virtue of her violation of § 3-503.2. And we further concur with the referee that there is clear and convincing evidence that Herzog's conduct was in violation of § 3-508.4(d). Herzog was aware that she no longer represented Rosemary, yet she filed at least two notices of appeal with the county court and a petition for further review with this court on Rosemary's behalf. The first notice was filed a full 3 months after the county court specifically informed Herzog that she no longer had the ability to file motions on Rosemary's behalf. Such conduct was prejudicial to the administration of justice.

We conclude that Herzog's arguments that she did not violate §§ 3-503.2 and 3-508.4(a) and (d) are without merit.

Counsel for Discipline's Cross-Exceptions

The Counsel for Discipline filed its own exceptions to the referee's report. The Counsel for Discipline contends that the referee erred by not concluding Herzog had violated §§ 3-503.1, 3-503.3(a)(1), and 3-508.4(c).

Section 3-503.1 provides in part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." And § 3-503.3(a) provides that "[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Finally, § 3-508.4 provides that "[i]t is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

We agree with the referee that there was not clear and convincing evidence to show violations of §§ 3-503.1, 3-503.3, and 3-508.4(c). Central to this determination are Herzog's attempts, in the two notices of appeal, to limit the scope of those notices to periods in which she was Rosemary's counsel of record. The

setting forth of such limitations shows an intent on Herzog's part to be candid about her representation of Rosemary, and thus was made in good faith and was not frivolous, was not knowingly false, and was not otherwise conduct that involved "dishonesty, fraud, deceit or misrepresentation."

While we do not believe Herzog was engaging in knowingly false or fraudulent conduct, we do want to make clear that by filing the notices of appeal and petition for further review, Herzog was, in fact, acting as Rosemary's counsel. The inclusion of limiting language in these notices of appeal does not serve to negate the fact that by filing those notices, Herzog purported to act as Rosemary's attorney.

Appropriate Discipline

Finally, we turn to the question of the appropriate discipline. Neb. Ct. R. § 3-304 states that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court[.]
> . . . .
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

[3-5] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[3] This court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.[4] The determination of an appropriate penalty to be imposed also requires the consideration of any aggravating or mitigating factors.[5]

The referee recommended that Herzog be publicly reprimanded and that her law license be placed on a probationary

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[3] *State ex rel. Counsel for Dis. v. Orr, ante* p. 102, 759 N.W.2d 702 (2009).

[4] *Id.*

[5] *Id.*

status for 1 year. The Counsel for Discipline has filed exceptions to this recommendation and instead suggests a 1-year suspension from the practice of law.

The facts in this case show that Herzog filed two notices of appeal and a petition for further review on behalf of someone who was not her client. And these filings were made despite the fact that Herzog had filed and been granted leave to withdraw in December 2005 and, moreover, had known for at least 3 months prior to the first filing on July 28, 2006, that as far as the county court was concerned, she had withdrawn as Rosemary's counsel.

We note that, as was found by the referee, Herzog had many letters of support, as well as character testimony from colleagues who attested to her good reputation. However, many of those same colleagues also noted that Herzog was "aggressive," "tenacious," and not a "shrinking violet." We agree with the finding of the referee that

> [a]lthough these traits can serve a lawyer well in the zealous representation of a client's cause, they can become a sword when turned on family members who don't accede to one's wishes. It is then that the law and its remedies become a means to an end when utilized by the lawyer who decides to serve his or her own wishes, rather than those of the client relative.

But what we are most concerned with is the fact that these formal charges represent Herzog's second disciplinary action regarding these guardianship proceedings. Even after her previous private reprimand, Herzog continued to engage in unethical behavior in the guardianship proceedings.

Based upon these considerations, this court concludes that a public reprimand and 1 year's probation is too lenient. We instead find that Herzog should be and hereby is suspended from the practice of law for a period of 3 months. Such suspension shall be followed by probation for a period of 1 year.

CONCLUSION

We find by clear and convincing evidence that Herzog violated §§ 3-503.2 and 3-508.4(a) and (d). In addition, we find there is insufficient evidence that Herzog violated §§ 3-503.1,

3-503.3(a)(1), and 3-508.4(c). It is the judgment of this court that Herzog be suspended from the practice of law for a period of 3 months, effective immediately. Following that suspension, Herzog shall be placed on probation for a period of 1 year.

Herzog shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of the 3-month suspension period, Herzog may apply to be reinstated to the practice of law, provided that she has demonstrated her compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Herzog has violated any disciplinary rule during her suspension. We also direct Herzog to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

ANN RICKERL, APPELLANT, V. FARMERS INSURANCE EXCHANGE, DOING BUSINESS AS FARMERS INSURANCE GROUP, APPELLEE.

763 N.W.2d 86

Filed March 27, 2009. No. S-08-188.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law. In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
4. **Insurance: Contracts.** An insurance policy is a contract, and its terms provide the scope of the policy's coverage.

5. ____: ____. Insurance contracts, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
6. ____: ____. When the terms of an insurance contract are clear, it should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. An ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings.
7. **Pleadings.** The issues in a given case will be limited to those which are pled.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Michael F. Coyle and Todd C. Kinney, of Fraser Stryker, P.C., L.L.O., for appellant.

Daniel P. Chesire and Sean A. Minahan, of Lamson, Dugan & Murray, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

Ann Rickerl leased a Honda Civic. As required by the lease, Honda Lease Trust (Honda) was named as the assignee of title to the vehicle, and Rickerl purchased an automobile insurance policy for the Civic from Farmers Insurance Exchange (Farmers). Following an accident, Rickerl made a claim on the policy, requesting that the Civic be repaired. Farmers refused, instead paying the fair market value of the vehicle to Honda, the loss payee. Rickerl filed this breach of contract claim. The primary issue presented is whether the automobile insurance contract allowed Farmers the unilateral right to choose whether to repair or replace a vehicle.

We conclude that the loss payable provision here gives Farmers the unilateral right to decide whether to repair or replace the damaged Civic. Accordingly, we affirm the district court's judgment dismissing Rickerl's claim.

FACTS

Rickerl leased a Honda Civic. Honda was named as the assignee of title under the lease. At the time of the lease, the Civic was valued at $15,989.67. Rickerl was required to make an initial payment of $1,805.92 and monthly payments of $251.17 for 35 consecutive months. The lease also required Rickerl to maintain automobile insurance and name Honda as the loss payee in the insurance policy. Rickerl purchased an automobile insurance policy from Farmers. The declarations page named Rickerl as the policyholder and Honda as the lienholder. The declarations page also included a "Loss Payable Provisions" section which stated in part:

> It is agreed that any payment for loss or damage to the vehicle described in this policy shall be made on the following basis:
>
> (1) At our option, loss or damage shall be paid as interest may appear to the policyholder and the lienholder shown in the Declarations, or by repair of the damaged vehicle.

Later, Rickerl was involved in a car accident. Following the accident, a Farmers claim representative estimated that the cost of repairing Rickerl's Civic was approximately $8,549.40. The fair market value of the Civic was determined to be $12,997. Rickerl notified Farmers that she wanted the Civic repaired. Farmers refused and declared the Civic a total loss. Farmers then wrote a check to Honda only, in the amount of $12,961.62 as full payment for the Civic. Honda accepted the check, released the lien, and submitted the certificate of title to Farmers. Farmers sold the Honda Civic for salvage for $5,000. Farmers then issued a check to Rickerl for $321.32, Farmers' estimation of Rickerl's "equity" in the Civic.

Rickerl filed suit against Farmers, and both parties filed motions for summary judgment. The district court ruled that Farmers did not breach the insurance contract by paying Rickerl and Honda their interests in the Civic through separate checks and initially ruled that Rickerl was properly compensated for her interest in the Civic. The court later ruled, however, that Rickerl had no equity interest in the Civic and dismissed Rickerl's claim with prejudice. Rickerl appeals.

ASSIGNMENTS OF ERROR

Rickerl assigns, restated, that the district court erred in (1) finding that the loss payable provision of the Farmers insurance policy gave Farmers the unilateral right to choose whether to repair or replace a vehicle after an accident, (2) finding that Farmers did not breach the contract when it determined the amount of Rickerl's damages and sent separate checks to Rickerl and Honda, and (3) determining as a matter of law the issue of Rickerl's damages.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

[3] The interpretation of an insurance policy is a question of law.[3] In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.[4]

ANALYSIS

In support of her first assignment of error, Rickerl argues that the loss payable provision of the insurance contract is ambiguous and does not grant Farmers the right to choose to repair or replace the Civic.

[4-6] An insurance policy is a contract, and its terms provide the scope of the policy's coverage.[5] Insurance contracts, like other contracts, are to be construed according to the sense and

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[1] *Borrenpohl v. DaBeers Properties*, 276 Neb. 426, 755 N.W.2d 39 (2008).

[2] *Id.*

[3] *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 733 N.W.2d 192 (2007).

[4] *Id.*

[5] *Id.*

meaning of the terms which the parties have used.[6] When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.[7] It should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.[8] An ambiguity exists only when the policy can be interpreted to have two or more reasonable meanings.[9]

Here, the loss payable provision provides that

> any payment for loss or damage to the vehicle described in this policy shall be made on the following basis:
>
> (1) At our option, loss or damage shall be paid as interest may appear to the policyholder and the lienholder shown in the Declarations, or by repair of the damaged vehicle.

Rickerl argues that the phrase "at our option" only means that Farmers can choose to pay a lienholder or the insured. Rickerl suggests that the loss payable provision actually means that "'at our option, we [the insurance company] can pay a lienholder in addition to the policyholder if such lienholder has a right to the money.'"[10] Rickerl claims that this interpretation of the loss payable provision is consistent with the purpose of such provisions, to protect the rights of a secured creditor.

We read the loss payable provision, however, to unambiguously grant Farmers the option to pay the loss or damages, or to repair the vehicle. Here, the terms of the loss payable provision are clear, and therefore, we will accord them their plain and ordinary meaning. The phrase "at our option" followed by two distinct prepositional phrases joined together by the conjunctive word "or" unambiguously establishes an option to pay replacement value or repair the vehicle. Under the terms

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[6] *Fokken v. Steichen*, 274 Neb. 743, 744 N.W.2d 34 (2008).

[7] *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008); *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[8] *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996).

[9] *Fokken*, *supra* note 6.

[10] Brief for appellant at 13.

of the loss payable provision, *any* payment Farmers makes for the damaged Civic "shall be paid" to Rickerl and Honda as their interests appear on the declarations page. As an alternative, the loss payable provision also allows Farmers the option to "repair . . . the damaged vehicle." In other words, the phrase "at our option" refers to the two options provided in the sentence: Either Farmers may pay the policyholder and lienholder, as their interests appear on the declarations page, "or" Farmers may repair the damaged vehicle. The loss payable provision is not ambiguous.

In her second assignment of error, Rickerl argues that Farmers breached the contract when it unilaterally determined Rickerl's damages and improperly paid Rickerl and Honda through two separate checks. Rickerl asserts that the loss payable provision required that both the policyholder's and lienholder's names be on one check. But the provision only provides that "loss or damage shall be paid as interest may appear to the policyholder and the lienholder shown in the Declarations." The terms of the policy do not require the interests of the policyholder and lienholder to be paid via one check; rather, the policy requires only that both be compensated for their respective interests. Accordingly, Farmers did not breach the contract by paying Honda and Rickerl with two separate checks.

Finally, Rickerl argues that Farmers breached the insurance agreement by unilaterally determining Rickerl's interest in the Civic was $321.32. Rickerl, however, failed to provide any evidence that she had a monetary interest in the vehicle. In her reply brief, Rickerl points to two affidavits which she claims "described the money she had put into the vehicle since leasing it."[11] The affidavits indicated that Rickerl had made a down-payment of $1,805.92 and 20 monthly payments of $251.17. This evidence, however, does not prove that Rickerl had a monetary interest in the Civic. On the contrary, the record, specifically the lease agreement, indicates that Honda, not Rickerl, had a monetary interest in the Civic. The lease agreement expressly and repeatedly provided that Rickerl's payments

[11] Reply brief for appellant at 5.

were lease payments that did not confer a proprietary interest in the vehicle.

[7] Furthermore, the issues in a given case will be limited to those which are pled.[12] Rickerl's operative complaint alleged that the policy had been breached by Farmers' refusal to repair the vehicle, not that the insurance policy had been breached by a failure to pay sufficient damages. Even had Rickerl provided evidence that she had a monetary interest in the Civic, that would not have been an issue of *material* fact, because Rickerl's complaint did not place that fact at issue. Because the pleadings do not place damages in dispute, Rickerl's final assignment of error is without merit.

CONCLUSION

For the reasons discussed above, we conclude that the district court properly granted Farmers' motion for summary judgment. Accordingly, we affirm.

AFFIRMED.

GERRARD, J., participating on briefs.

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[12] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

KATHERINE LEACH, APPELLANT, V. JOHN DAHM, WARDEN, NEBRASKA CORRECTIONAL CENTER FOR WOMEN, ET AL., APPELLEES.

763 N.W.2d 83

Filed March 27, 2009. No. S-08-461.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review.
2. **Criminal Law: States: Prisoners.** Nebraska's Interstate Corrections Compact, Neb. Rev. Stat. § 29-3401 (Reissue 2008), provides for the transfer of prisoners from one state to another for rehabilitation and correctional purposes, and establishes the rights and duties of the states sending and receiving prisoners.
3. ____: ____: ____. Under Nebraska's Interstate Corrections Compact, Neb. Rev. Stat. § 29-3401 (Reissue 2008), Nebraska, as the receiving state, acts solely as agent for a sending state.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Stacey L. Parr, of Svehla, Thomas, Rauert & Grafton, P.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellees John Dahm and Robert Houston.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Katherine Leach was convicted of two counts of driving under the influence manslaughter in Palm Beach County, Florida, but is presently confined in York, Nebraska, under Nebraska's Interstate Corrections Compact (ICC).[1] Leach filed an application for habeas corpus relief in a Nebraska district court. The primary issue presented on appeal is whether the Nebraska courts have jurisdiction over this case under the ICC.

FACTS

Leach was convicted of two counts of driving under the influence manslaughter in Palm Beach County and, in July 1999, was sentenced to 22½ years' imprisonment. Currently, Leach is confined in the Nebraska Correctional Center for Women. More than 8 years after her conviction, Leach filed an "Amended Petition for Writ of Habeas Corpus" in the York County District Court, against various Nebraska state officials responsible for her incarceration (collectively the State). In the amended petition, Leach alleged that her Florida sentence was void in violation of her right not to be subjected to cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution. In response, the State filed a motion to dismiss, arguing, among other things, that the court lacked subject matter jurisdiction under Nebraska's ICC. The ICC provides that "[a]ny decision of the sending State in respect of any matter over which it retains jurisdiction pursuant to this Compact shall

[1] Neb. Rev. Stat. § 29-3401 (Reissue 2008).

be conclusive upon and not reviewable within the receiving State . . . ."[2] After a hearing on the motion to dismiss, the court dismissed the petition for lack of subject matter jurisdiction. Leach appeals.

ASSIGNMENTS OF ERROR

Leach assigns, restated, that the district court erred in (1) concluding that it did not have jurisdiction over Leach and all questions relating to her incarceration and (2) dismissing her petition with prejudice.

STANDARD OF REVIEW

[1] Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review.[3]

ANALYSIS

The issue presented on appeal is whether the district court erred in granting the State's motion to dismiss for lack of jurisdiction. We conclude that under the terms of the ICC, the district court correctly dismissed the action for lack of subject matter jurisdiction. In order to determine whether the district court had jurisdiction over Leach's amended petition for a writ of habeas corpus, we turn to the ICC.

[2,3] The ICC provides for the transfer of prisoners from one state to another for rehabilitation and correctional purposes, and establishes the rights and duties of the states sending and receiving prisoners.[4] Florida and Nebraska have adopted the ICC,[5] and its provisions are dispositive of the narrow question before us. Under the provisions of the ICC, an inmate confined in an institution in a receiving state is at all times "subject to

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[2] § 29-3401, art. V(a).

[3] See *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007).

[4] *Smart v. Goord*, 21 F. Supp. 2d 309 (S.D.N.Y. 1998).

[5] See, § 29-3401; Neb. Rev. Stat. § 29-3402 (Reissue 2008); Fla. Stat. Ann. §§ 941.55 to 941.57 (West 2006).

the jurisdiction of the sending State."[6] Nebraska, as the receiving state, acts solely as agent for Florida, the sending state.[7] As a result, Leach is subject to Florida jurisdiction with respect to whether her Florida sentence is unconstitutional under the Eighth Amendment.[8] Any hearings in Nebraska considering whether Leach's sentence was unconstitutional may be held only if authorized by Florida and, if so held, are governed by the laws of Florida.[9] And Leach does not allege that Florida authorized Nebraska to consider whether Leach's sentence was unconstitutional.

Leach argues that pursuant to Neb. Rev. Stat. § 29-2801 et seq. (Reissue 2008), the district court had jurisdiction over her petition for a writ of habeas corpus. Leach asserts that under § 29-2801, a petition for a writ of habeas corpus must be filed in the county in which the prisoner is confined—here, York County.[10] We conclude, however, that § 29-2801 does not conflict with the ICC. York County would be the proper *venue* for a petition for a writ of habeas corpus under *Nebraska* law,[11] but § 29-2801 does not confer jurisdiction on a Nebraska court to determine the validity of a Florida sentence.

A writ of habeas corpus is a statutory remedy available to those who are detained without having been convicted of a crime and committed for the same, those who are unlawfully deprived of their liberty, or those who are detained without any legal authority.[12] It is not disputed that Leach was convicted of a crime, so her right to habeas relief rests upon her allegation that her sentence is unlawful. But pursuant to article IV(f)

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[6] See, § 29-3401, art. IV(c); *Falkner v. Neb. Board of Parole*, 213 Neb. 474, 330 N.W.2d 141 (1983). See, also, *Brant v. Fielder*, 883 P.2d 17 (Colo. 1994); *Ellis v. DeLand*, 786 P.2d 231 (Utah 1990); *Dugger v. Jackson*, 598 So. 2d 280 (Fla. App. 1992).

[7] § 29-3401, art. IV(a). See, also, *Brant*, *supra* note 6; *Ellis*, *supra* note 6; *Meyer v. Moore*, 826 So. 2d 330 (Fla. App. 2002).

[8] See § 29-3401, art. IV(c).

[9] See § 29-3401, art. IV(f).

[10] See *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[11] See *id.*

[12] *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001).

of the ICC, Nebraska is acting solely as agent for Florida. Accordingly, Florida retains jurisdiction over questions relating to the constitutionality of Leach's sentence. Leach must bring any claim regarding her sentence to the authorities of the State of Florida. Nebraska is bound by the terms of the ICC, and therefore, we lack jurisdiction over Leach's petition for habeas relief.

CONCLUSION

The judgment of the district court dismissing Leach's amended petition for habeas corpus is affirmed. The denial of habeas corpus relief is jurisdictional, and without prejudice to any avenue of relief Leach may pursue in Florida.

AFFIRMED.

LUCILLE KILGORE, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND THE STATE OF NEBRASKA, APPELLANTS AND CROSS-APPELLEES, AND LEEANNA CARR AND MELVIN WASHINGTON, APPELLEES.

763 N.W.2d 77

Filed March 27, 2009. No. S-08-481.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. ____: ____. Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.
4. **Attorney Fees: Costs.** Attorney fees, where recoverable, are generally treated as an element of court costs.
5. **Judgments: Final Orders: Attorney Fees: Costs: Appeal and Error.** An award of costs in a judgment is considered a part of the judgment. As such, a judgment does not become final and appealable until the trial court has ruled upon a pending statutory request for attorney fees.
6. **Final Orders: Appeal and Error.** To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2008).

7. ____: ____. Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
8. **Judgments: Final Orders.** Neb. Rev. Stat. § 25-1301 (Reissue 2008) sets forth two ministerial requirements for a final judgment: the rendition of a judgment and the entry thereof.
9. **Judgments: Records: Words and Phrases.** Rendition of a judgment is defined as the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action.
10. ____: ____: ____. Entry of a judgment is defined as the act of the clerk of the court in placing the file stamp and date upon the judgment.
11. **Trial: Judgments: Records.** The mere oral announcement of a judgment without an entry on the trial docket is not the rendition of a judgment.
12. **Final Orders.** For a final judgment to exist, there must be an order that is both signed by the court and file stamped and dated by the clerk of the court.
13. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during future proceedings.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Appeal dismissed.

Jon Bruning, Attorney General, Stephanie Caldwell, and Frederick J. Coffman for appellants.

Raymond R. Aranza and Leanne A. Gifford, of Scheldrup, Blades, Schrock, Sand & Aranza, P.C., for appellee Lucille Kilgore.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

NATURE OF CASE

In the underlying action, the court entered judgment in the amount of $447,005 in favor of Lucille Kilgore and against the State of Nebraska and the Nebraska Department of Health and Human Services (DHHS). DHHS and the State appeal. We conclude that DHHS and the State's appeal from the court's order was an appeal from a nonfinal order, because the court

did not determine all the issues before it, including whether Kilgore was entitled to attorney fees.

BACKGROUND

In 2004, Kilgore commenced this action against DHHS, the Nebraska Department of Correctional Services (DCS), the State of Nebraska, Leeanna Carr, and Melvin Washington, claiming she was taken advantage of and manipulated into working without pay. Kilgore requested damages for pain and suffering, past compensation, and attorney fees.

For over 30 years, Kilgore performed the tasks of a full-time juvenile parole services officer without receiving any compensation. Kilgore alleged that for over 30 years, she performed a significant amount of the duties and responsibilities of Washington, an employed parole officer. By 1983, Kilgore was working at least 70 hours per week and was doing most if not all of Washington's work. Some of the duties Kilgore performed for Washington included typing his reports, monitoring the curfew of his parolees, and other administrative work at Washington's request. Kilgore alleged that Washington took advantage of her and that Carr, his supervisor, was aware of this abuse.

In her complaint, causes of action Nos. 1, 2, and 6 were directed at defendants DHHS, DCS, and the State. Cause of action No. 1 was dismissed by summary judgment. Kilgore alleged in cause of action No. 2 that her equal protection rights were violated, because she was not afforded the same treatment as other employees that received compensation for their services. In cause of action No. 6, Kilgore alleged that she was an employee pursuant to federal and state minimum wage laws and is entitled to money damages equal to the salary paid to Washington beginning from the year 2000 until the present time.

Causes of action Nos. 4 and 5 were directed at only Washington. Kilgore alleged in cause of action No. 4 that she was entitled to recover damages from Washington based on unjust enrichment. And in cause of action No. 5, Kilgore alleged breach of contract.

Cause of action No. 3 was directed at both Washington and Carr. Kilgore alleged that Washington's and Carr's conduct

violated her constitutional rights under color of state law and that she was entitled to recover damages, pursuant to 42 U.S.C. § 1983 (2000).

Cause of action No. 7 was directed at all of the defendants. In that cause of action, Kilgore claimed the defendants breached their fiduciary duty to her.

Before a trial on the merits, the court, by written order, dismissed DCS as a defendant for lack of jurisdiction. On March 10 through 12, 2008, the court held a bench trial. On the first day of trial, the court announced default judgment against Washington and stated it would postpone its determination of damages until after the trial.

Before closing arguments, DHHS and the State renewed their motion for summary judgment in regard to any claim against them brought under 42 U.S.C. § 1983, arguing that any such claim is barred by sovereign immunity. Additionally, DHHS and the State argued that any claim under the federal Equal Pay Act (EPA) was barred by sovereign immunity. The trial court overruled this motion as to any claim pursuant to the EPA but granted the motion as to any claim against DHHS or the State pursuant to § 1983. A review of the second amended petition reveals that no claim for violations of § 1983 was alleged against DHHS or the State.

Carr made an oral motion asking the court to dismiss the cause of action alleging § 1983 violations against her. The court granted this motion, concluding that Kilgore failed to produce sufficient evidence that Carr had violated Kilgore's constitutional rights. Additionally, the trial court concluded that Carr did not owe a fiduciary duty to Kilgore. Thus, the court announced a directed verdict in favor of Carr as to causes of action Nos. 3 and 7.

After the close of evidence, the court announced its ruling from the bench. The court concluded that Kilgore effectively became an employee in the year 1983 for purposes of the federal Fair Labor Standards Act. Additionally, the court determined that under the EPA, Kilgore did not receive pay equal to that of what other males, including Washington, were receiving. The court took the matter of damages under advisement and stated that it was "not specifically including the

second cause of action [equal protection violations] in its ruling." Before adjourning, the trial court also indicated it would make a determination regarding attorney fees after calculating Kilgore's damages.

In summary, the trial court announced its judgment as follows: (1) granted default judgment against Washington and in favor of Kilgore but did not determine the amount of damages; (2) granted the State's renewal of its motion for summary judgment regarding any cause of action alleged against the State based on § 1983, when in fact, no cause of action based on § 1983 was alleged against the State, but overruled the State's motion as to the claim under the EPA; and (3) granted a directed verdict in favor of Carr relating to causes of action Nos. 3 and 7.

On March 18, 2008, the court entered its written order. In that order, the court stated, "[f]or the reasons stated on the record in open court this Court found in favor of [Kilgore] and against [DHHS] and the State of Nebraska on her claims under the theories of unjust enrichment, [the EPA,] and Fair Labor Standards Act." The trial court awarded Kilgore $447,005 in damages. Our review of the second amended petition reveals that Kilgore did not assert a cause of action against DHHS or the State based on unjust enrichment. The order was brief and did not make any express determinations regarding the finality of its judgment pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008).

The written order (as opposed to the oral announcements) did not mention any judgment regarding Washington or Carr, and the court did not make any determination as to the issue of attorney fees.

On March 21, 2008, Kilgore filed an application for attorney fees with the court, and a few days later, DHHS and the State filed a motion for new trial. The court denied their motion, and on May 1, DHHS and the State filed their notice of appeal, and Kilgore cross-appealed.

There is no docket sheet contained in the record. And from our review of the record, we can find no written entries regarding judgment against Washington, Carr, or on the issue of attorney fees.

ASSIGNMENTS OF ERROR

DHHS and the State argue that the trial court erred by concluding (1) that Kilgore was an employee within the meaning of the Fair Labor Standards Act; (2) that Kilgore was entitled to relief under the EPA; (3) that Kilgore was entitled to an award of damages under a theory of unjust enrichment; and (4) that DHHS and the State were liable through vicarious liability when the agent, Carr, was not found liable. They also argue that the trial court erred because Kilgore's award for damages violates the EPA's statute of limitations.

On cross-appeal, Kilgore argues that the trial court erred in concluding that DHHS and the State (1) were not liable under the Adult Protective Services Act and (2) were not negligent.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[2] Notwithstanding whether the parties raise the issue of jurisdiction, an appellate court has a duty to raise and determine the issue of jurisdiction sua sponte.[3]

We determine that the March 18, 2008, order is not a final, appealable order for two reasons. First, the issue of attorney fees has yet to be decided. Second, the March 18 order entered judgment as to only two of the four remaining defendants. However, this case presents at least one other jurisdictional issue. The March 18 order entered judgment as to at least one but not all of Kilgore's causes of action.

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[1] *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

[2] *Id.*

[3] *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

Attorney Fees

[4,5] Attorney fees, where recoverable, are generally treated as an element of court costs.[4] An award of costs in a judgment is considered a part of the judgment.[5] As such, a judgment does not become final and appealable until the trial court has ruled upon a pending statutory request for attorney fees.[6]

Kilgore properly requested attorney fees in her petition, and at the close of the bench trial, the court announced that it would make its determination regarding attorney fees after it calculated Kilgore's damages. At the time the notice of appeal was filed, the court had determined Kilgore's damages, but had not ruled upon Kilgore's request for attorney fees. The failure of the trial court to rule on Kilgore's request for attorney fees left a portion of the judgment unresolved, and consequently, the order from which DHHS and the State appealed and Kilgore cross-appealed is not final. Thus, we must dismiss this appeal for lack of jurisdiction.

Multiple Parties

In this case, there are multiple defendants, thus there are multiple parties. When multiple parties are involved, the requirements of § 25-1315 are implicated. We conclude that the trial court's written order, as opposed to the court's oral announcements in open court, did not direct the entry of final judgment as to all of the defendants.

[6,7] Section 25-1315 allows an appeal only where multiple causes of action are presented or multiple parties are involved and the trial court expressly directs the entry of a final judgment as to one cause of action or a party and expressly determines that there is no just reason for delay of an immediate appeal. Additionally, to be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2008).[7] Under § 25-1902, the three types

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[4] *Olson v. Palagi*, 266 Neb. 377, 665 N.W.2d 582 (2003).

[5] See *id.*

[6] See, *id.*; *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[7] See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.

[8-12] Neb. Rev. Stat. § 25-1301 (Reissue 2008) sets forth two ministerial requirements for a final judgment. First, § 25-1301(2) requires rendition of a judgment, which is defined as the act of the court, or a judge thereof, in making and signing a written notation of the relief granted or denied in an action. Second, § 25-1301(3) requires the entry of a judgment, which is defined as the act of the clerk of the court in placing the file stamp and date upon the judgment. We have explained that the mere oral announcement of a judgment without an entry on the trial docket is not the rendition of a judgment.[8] In other words, for a final judgment to exist, there must be an order that is both signed by the court and file stamped and dated by the clerk of the court.[9]

It is clear that the March 18, 2008, written order affects a substantial right which determines the action, thus the written order satisfied § 25-1902(1). However, the written order does not satisfy § 25-1301 or § 25-1315. In the March 18 order, the court entered judgment as to only two of the four remaining defendants—DHHS and the State. But the written order did not enter judgment against Washington or Carr. In fact, the written order did not even mention Washington or Carr. Additionally, our review of the record reveals no evidence of any written entries that purport to enter judgment against Washington or enter directed verdict in favor of Carr.

The trial court's mere oral announcement of its judgment against Washington and its directed verdict in favor of Carr, without a written entry that is signed by the court, file stamped, and dated, is insufficient to render final judgment. As

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[8] See *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973).

[9] See, § 25-1301; *State v. Brown*, 12 Neb. App. 940, 687 N.W.2d 203 (2004).

such, the trial court's written order is not a final, appealable order pursuant to § 25-1315.

Causes of Action

[13] Although we have concluded that we lack jurisdiction over this appeal, we briefly address the remaining jurisdictional issue because it is likely to recur. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during future proceedings.[10]

We are uncertain as to which causes of action the court did and did not dispose of. For instance, the court specifically announced in open court that its ruling would not include Kilgore's second cause of action alleging equal protection violations. The written order did not mention the second cause of action. We are unclear whether the court, by not including the second cause of action in its written order, meant to deny recovery based on the alleged equal protection violations or if the court intended to withhold its ruling for a later time. Additionally, the court's written order found in favor of Kilgore and against DHHS and the State based on unjust enrichment; however, Kilgore did not assert a claim of unjust enrichment against DHHS or the State. Because of this, we are unclear as to which causes of action the court, in its written order, actually disposed of.

CONCLUSION

For the reasons stated above, we lack jurisdiction over this appeal.

Appeal dismissed.

Miller-Lerman, J., participating on briefs.

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[10] *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

IN RE CONSERVATORSHIP OF CAROL A. GIBILISCO, A PROTECTED PERSON. POPULAR FINANCIAL SERVICES, L.L.C., A DELAWARE CORPORATION, APPELLEE, V. TOMMY JOE STUTZKA, CONSERVATOR, APPELLANT.

763 N.W.2d 71

Filed March 27, 2009. No. S-08-502.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Jurisdiction.** The question of jurisdiction is a question of law.
4. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Decedents' Estates: Wills: Courts: Jurisdiction.** The probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

Appeal from the County Court for Douglas County: LYN V. WHITE, Judge. Affirmed.

James Polack, P.C., L.L.O., for appellant.

Matthew E. Eck and Donald J. Pavelka, Jr., of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Tommy Joe Stutzka, as conservator of Carol A. Gibilisco, appeals the order of the county court for Douglas County allowing the claim of Popular Financial Services, L.L.C. (Popular), and ordering Stutzka to pay $85,000 to Popular.

The claim was based on a judgment obtained in the U.S. District Court for the District of Nebraska in which the court directed, as part of a comprehensive order of rescission, that Gibilisco remit to Popular the sum of $85,000, without interest. Stutzka claims that due to the "probate exception" doctrine, the federal court exceeded its subject matter jurisdiction and that its judgment and the claim based thereon are not valid. Because we conclude that the "probate exception" is not applicable, we affirm the order of the county court allowing Popular's claim.

STATEMENT OF FACTS

Stutzka was appointed as Gibilisco's conservator in February 2002. Gibilisco was a widow in her sixties who had been blind since birth and was developmentally disabled.

Shortly after being appointed conservator, Stutzka, as conservator for Gibilisco, filed an action in the U.S. District Court for the District of Nebraska and named James P. McCarville, Cheryl Nord-McCarville, James Walters, and Popular as defendants. The various causes of actions arose out of certain loan transactions involving Gibilisco, her husband, and the defendants in the 1990's and early 2000's.

In sum, in 1999, McCarville and Nord-McCarville persuaded Gibilisco and her husband to obtain a home equity loan on a house the Gibiliscos owned on Hickory Street in Omaha, Nebraska, and to use the loan proceeds to purchase equipment for the business. Walters acted as a mortgage broker for the transaction. The Gibiliscos obtained a $55,000 loan from U.S. Bank, and later opened a line of credit with U.S. Bank that had an approved limit of $25,000. The Gibiliscos thought the McCarvilles would make the payments on the loans, but after a few months, U.S. Bank informed the Gibiliscos that the loans were in default.

After Gibilisco's husband died in 2001, Walters worked with Gibilisco to refinance the U.S. Bank loans by obtaining an $85,000 loan from Popular. Walters made various misstatements in the application for the loan. The Popular loan named Nord-McCarville as borrower and Gibilisco as coborrower. As part of this transaction, Gibilisco signed a deed conveying the

Hickory Street property to herself and Nord-McCarville jointly. The proceeds of the Popular loan were used to pay off the U.S. Bank loan and line of credit.

In the action filed in federal court in 2002, Stutzka asserted violations of the Truth in Lending Act, 15 U.S.C. § 1601 et seq. (2006), and of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq. (2006). He also asserted civil conspiracy. Stutzka sought to rescind the deed, promissory note, and deed of trust related to the Popular loan; to quiet title in the Hickory Street property in Gibilisco's name; and to obtain a temporary restraining order.

Following trial, the U.S. District Court filed its findings of fact and conclusions of law on May 21, 2004. The court concluded, inter alia, that it had jurisdiction of the matter pursuant to 28 U.S.C. §§ 1331 (federal question) and 1367 (supplemental jurisdiction) (2006). The court also concluded that judgment should be entered in favor of Stutzka as conservator and against the defendants on at least part of the claims. The court concluded that the "appropriate remedy is rescission, which encompasses the parties' return to the pre-transaction status quo. *Kracl v. Loseke,* [236 Neb. 290,] 461 N.W.2d 67, 76 (Neb. 1990)."

On June 21, 2004, the court entered judgment in favor of Stutzka and against the defendants and ordered, inter alia, that the Popular loan agreement be rescinded, that the deed from Gibilisco to Gibilisco and Nord-McCarville jointly be declared null and void, that title to the Hickory Street property be quieted in Gibilisco, and that the promissory note and deed of trust be reformed to remove Gibilisco as a borrower. The court further indicated in its judgment that "Gibilisco shall remit to Popular the sum of $85,000, without interest."

Stutzka appealed the U.S. District Court judgment to the Court of Appeals for the Eighth Circuit. Stutzka asserted, inter alia, that the U.S. District Court erred by ordering Gibilisco to remit $85,000 to Popular. Stutzka did not argue to the Eighth Circuit that the U.S. District Court lacked jurisdiction to enter the order. Instead, he argued other errors that the Eighth Circuit rejected in part. The Eighth Circuit concluded, inter alia, that because Nebraska law is clear that rescission requires a

return to the status quo, the U.S. District Court did not err in ordering Gibilisco to repay the $85,000 to Popular. *Stutzka v. McCarville*, 420 F.3d 757 (8th Cir. 2005). The Eighth Circuit affirmed the portion of the order requiring Gibilisco to pay $85,000 to Popular, but reversed other portions of the order and remanded the matter for further proceedings on issues not relevant to the present case. The remaining issues were resolved by the U.S. District Court, and the U.S. District Court's decision thereon was affirmed by the Eighth Circuit. *Stutzka v. McCarville*, 243 Fed. Appx. 195 (8th Cir. 2007).

Popular transcribed the U.S. District Court judgment to the district court for Douglas County. On October 24, 2007, the district court stayed its proceedings pending resolution of a claim Popular would file in the county court for Douglas County. On November 9, Popular filed in the county court a "Notice of Claim/Judgment and Motion for Order of Payment of Claim/Judgment." Popular requested an order requiring Gibilisco's conservator to satisfy the $85,000 judgment entered against Gibilisco.

On January 4, 2008, Stutzka filed in the county court and mailed to Popular a notice of disallowance of claim. On January 11, Popular filed a petition for allowance of claim in the county court. Although it was not specified in the petition, it appears that the petition was filed under Neb. Rev. Stat. § 30-2657 (Reissue 2008), which provides that a "conservator must pay from the estate all just claims against the estate and against the protected person" and that a "claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation and, upon due proof, procure an order for its allowance and payment from the estate." On April 23, the county court entered an order granting Popular's petition for allowance of claim. This county court order is the subject of the present appeal.

In rendering its order of April 23, 2008, the county court rejected Stutzka's argument that the U.S. District Court lacked jurisdiction to order Gibilisco to pay $85,000 to Popular. Stutzka had argued that the order was in violation of the "probate exception" set forth in *Markham v. Allen*, 326 U.S. 490, 66

S. Ct. 296, 90 L. Ed. 256 (1946). Stutzka argued that by ordering Gibilisco to remit $85,000 to Popular, the U.S. District Court improperly exercised control over Gibilisco's property. The county court noted that Stutzka was the party who filed the action in federal court; that Stutzka requested rescission of the mortgage; that the federal court granted Stutzka the rescission he requested; and that under Nebraska law, in ordering rescission, a court must require all parties to return whatever they acquired under the rescinded document. The county court determined that a necessary part of the rescission of the mortgage was that Gibilisco pay back the proceeds she had received from the loan. The county court further concluded that because the U.S. District Court had jurisdiction over the suit filed by Stutzka, Stutzka was bound by the judgment entered by the U.S. District Court and was barred from collaterally attacking the validity of that judgment in the county court. As noted, the county court granted Popular's petition for allowance of claim and ordered Stutzka as conservator to pay Popular $85,000 without interest.

Stutzka appeals the order of the county court.

ASSIGNMENT OF ERROR

Stutzka asserts that the county court erred in ordering him to pay Popular $85,000. He claims that the U.S. District Court exceeded its subject matter jurisdiction when it directed that Gibilisco remit $85,000 to Popular and that the judgment on such order did not amount to an allowable claim.

STANDARDS OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3,4] The question of jurisdiction is a question of law. *Id.* On a question of law, an appellate court is obligated to reach

a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Stutzka claims that because of the "probate exception" to federal jurisdiction, the U.S. District Court lacked subject matter jurisdiction to order that "'*Gibilisco . . . remit the sum of $85,000 to Popular Bank*'" and that Popular's claim for allowance based on the federal judgment should therefore be disallowed. We conclude that the probate exception does not apply to the action that Stutzka brought in federal court, that the U.S. District Court had jurisdiction to enter its order, and that Popular's claim was properly allowed by the county court.

In *Markham v. Allen*, 326 U.S. 490, 66 S. Ct. 296, 90 L. Ed. 256 (1946), the U.S. Supreme Court set forth the probate exception to federal jurisdiction, pursuant to which the federal trial courts are barred from exercising jurisdiction in certain circumstances. In *Markham*, the Court stated that "a federal court has no jurisdiction to probate a will or administer an estate" and that "a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court." 326 U.S. at 494. However, notwithstanding the probate exception, the Court stated that federal courts retained jurisdiction over suits by claimants against an estate to establish claims "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court" and that a federal court "may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." *Id.*

[5] The U.S. Supreme Court refined the scope of the probate exception in *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006). In *Marshall*, the Court described the probate exception as being "of distinctly limited scope." 547 U.S. at 310. The Court stated that

> the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

547 U.S. at 311-12. The Court concluded that the claim at issue in *Marshall* did not involve the administration of an estate, the probate of a will, or any other purely probate matter, but, instead, that the claim alleged "a widely recognized tort" and that "[t]rial courts, both federal and state, often address conduct of the kind" alleged. 547 U.S. at 312.

For completeness, we digress to comment on outstanding issues regarding the probate exception and the use of the word "probate" in Nebraska jurisprudence. We are aware that after *Marshall*, certain questions remain regarding the breadth and applicability of the probate exception. We recognize that there is some question whether the probate exception is applicable to federal cases based on federal question jurisdiction. See Allison Elvert Graves, Comment, Marshall v. Marshall: *The Past, Present, and Future of the Probate Exception to Federal Jurisdiction*, 59 Ala. L. Rev. 1643 (2008). For purposes of this opinion, we assume that the probate exception applies to federal cases based on federal question jurisdiction. *Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006). We are also aware that whether the probate exception applies to will substitutes, such as trusts, appears to be an unresolved question. See Graves, *supra*.

More fundamentally, there is a question whether the probate exception is even relevant to a conservatorship case involving a protected person as distinguished from a matter involving a decedent. See *Clifford v. Premier Housing, Inc.*, No. 06-1111-MLB, 2006 WL 2710338 (D. Kan. Sept. 20, 2006) (concluding that probate exception is not applicable to case involving contract for purchase of home and return of downpayment in action filed by conservator). It appears that federal cases and commentators restrict discussion of the probate exception to cases involving decedents. Peter Nicholas,

Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction, 74 S. Cal. L. Rev. 1479 (2001). However, given the indistinct use of the word "probate" in general and in Nebraska jurisprudence in particular, we will assume strictly for purposes of discussion in this case, as urged by the parties, that the federal probate exception is relevant to the analysis of this conservatorship case. In this regard, we note that in Nebraska statutes, the definitions of a "[c]laim" involving a protected person, the "[c]ourt" handling a conservatorship, and the "[c]onservator" are all found in chapter 30, article 22, of the Nebraska Revised Statutes entitled "Probate Jurisdiction." See Neb. Rev. Stat. § 30-2209(4), (5), and (6) (Reissue 2008). Our cases have referred to guardianship issues as being "probate" matters, see *In re Guardianship of Zyla*, 251 Neb. 163, 164, 555 N.W.2d 768, 770 (1996), and a conservator's duties as being controlled by the probate code, see *In re Conservatorship of Estate of Martin*, 228 Neb. 103, 421 N.W.2d 463 (1988). More recently, however, we have distinguished between conservatorship proceedings and probate proceedings, the latter involving issues pertaining to a decedent's estate. See *In re Guardianship & Conservatorship of Trobough*, 267 Neb. 661, 676 N.W.2d 364 (2004).

Applying the definitions set forth in *Markham v. Allen*, 326 U.S. 490, 66 S. Ct. 296, 90 L. Ed. 256 (1946), and *Marshall v. Marshall*, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480 (2006), and given our caveat and assumptions noted immediately above, we conclude that the action Stutzka brought in federal court to adjudicate the rights of the parties did not, to the extent it is applicable, fall under the probate exception. As described recently in *Marshall*, the probate exception is of limited scope and applies only to (1) the probate or annulment of a will, (2) the administration of a decedent's estate, and (3) the disposition of property in the custody of a state probate court. We apply these three descriptions to the facts of this case.

Stutzka filed the action in federal court as the conservator for a person under a disability, and not involving a decedent. Stutzka was not raising issues in federal court related to a will

or a decedent's estate. Therefore, the federal court action did not involve the probate or annulment of a will or the administration of a decedent's estate. Further, the action filed by Stutzka in federal court did not involve the disposition of property in the custody of a state court. The federal court was asked to, and did, adjudicate the rights of the parties—not to dispose of specific property. As we read *Markham* and *Marshall*, the adjudication of rights is a proper subject matter of federal jurisdiction. The federal court granted Stutzka's request for the rescission of the Popular loan agreement and ordered that the parties be returned to the status quo that existed prior to the transaction. In order to effect the return to the status quo, and as an incident thereto, the court ordered that Gibilisco should return to Popular the proceeds of the loan received from Popular. Such direction did not involve the federal court directly in the disposition of property under the control of a state court. The judgment of the federal court was not outside the court's subject matter jurisdiction, and we reject Stutzka's argument to the contrary.

The aspect of the federal judgment which indicated that Gibilisco should pay Popular $85,000 became a liability of Gibilisco and, as such, the proper subject matter of a "claim." See § 30-2209(4). Because it was a valid claim against Gibilisco, Stutzka, as conservator, was required to pay such claim under § 30-2657. The county court therefore did not err in granting Popular's petition for allowance of the claim and in ordering Stutzka to pay the claim to Popular.

CONCLUSION

We conclude that the probate exception did not apply to the action that Stutzka brought in federal court, and we reject Stutzka's argument that the U.S. District Court lacked subject matter jurisdiction to enter its judgment. The county court did not err in allowing Popular's claim based on the federal court judgment. We affirm.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM T. GINSBURG, RESPONDENT.

763 N.W.2d 378

Filed March 27, 2009. No. S-08-1294.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, William T. Ginsburg. The court accepts respondent's surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 25, 1973. On December 11, 2008, the chairperson of the Committee on Inquiry of the Second Disciplinary District filed an application for the temporary suspension of respondent from the practice of law. The application stated that in 2005, 2006, and 2007, respondent represented James R. Sleeter in a dissolution of marriage action, and that sometime in 2007, respondent received Sleeter's net proceeds from the sale of real estate property. The application stated that respondent used some or all of these assets for his own purposes without Sleeter's knowledge.

The application stated that Sleeter died in 2008 and that his daughter, Diana Schuman, hired respondent to initiate estate proceedings. The application further stated that at the time of his death, Sleeter owed state and federal income taxes and real estate taxes. Respondent had prepared checks to pay various expenses but respondent had not sent the checks to the respective payees, because respondent had insufficient funds in his trust account. The application stated that on October 1, 2008, respondent admitted to Schuman's successor attorney that he did not have Sleeter's funds available, but indicated that he

would make restitution. The application stated that on October 28, respondent issued a trust account check to the law firm representing Schuman in the amount of $42,500, and represented that it was the equivalent of principal and interest on Schuman's funds.

On December 17, 2008, this court entered an order directing respondent to show cause by December 29 why his license should not be temporarily suspended. Respondent filed a motion to extend the show cause deadline, which this court granted.

On January 21, 2009, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent does not challenge or contest the truth of the allegations in the application for temporary suspension. In addition to surrendering his license, respondent consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him in the application for temporary suspension. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent voluntarily has stated that he knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension, that he failed to maintain his client's funds, and that to the contrary, he used the funds for his own purposes. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. With the exception of a sworn statement under oath that respondent has complied with Neb. Ct. R. § 3-316(3), respondent has complied with the terms of § 3-316. Accordingly, respondent is directed to comply with all the terms of § 3-316 and to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA, APPELLEE, V.
KENNETH R. WELLS, APPELLANT.

763 N.W.2d 380

Filed April 3, 2009. No. S-07-1138.

1. **Judgments: Speedy Trial.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial: Proof.** To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Beau G. Finley, of Finley Law Offices, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

This is an appeal from the denial of a motion to discharge based on the Nebraska speedy trial statutes.[1] The issue presented in this case is whether the district court committed clear error in concluding that the defendant, Kenneth R. Wells, agreed to a continuance at a pretrial conference. Finding no clear error, we affirm the order of the district court.

BACKGROUND

Wells was charged by information on April 21, 2006, with unlawful possession with intent to deliver a controlled substance. At a pretrial conference, Wells moved for a continuance, and the motion was sustained. A series of hearings and continuances followed; all of the continuances were requested by Wells, and it is not disputed that those periods were excludable time for speedy trial purposes.

The period of time disputed in this appeal began on January 19, 2007, at another pretrial conference. Trial was set for January 31, but Wells' counsel explained that he would be unable to prepare for trial on that date because of another pending trial. Wells was given the choice of "joining" his counsel's motion for a continuance, proceeding to trial and representing himself, or having other counsel appointed. Wells replied, "Yeah, I'd like to stick — no problem at all. If he would like me to get a continuance, that's what I'll do. You think — if he tells me that's the best thing to do, I'm going to do it." Wells was given some time to think about it and confer with counsel, and he reaffirmed that continuing the proceedings to the next available trial date would "be fine."

After a short recess, the court informed Wells that the next available trial date was April 16, 2007. Wells affirmed that he understood that the time between the hearing and April 16 would not count for speedy trial purposes. Another pretrial conference was scheduled for February 23, and Wells

[1] See Neb. Rev. Stat. § 29-1201 et seq. (Reissue 2008).

expressed his understanding that the speedy trial "clock would not run on that one" either. At the February 23 hearing, speedy trial issues were discussed and the parties agreed that because of the continuances requested by Wells, the scheduled trial date was inside the remaining speedy trial period. Wells indicated to the court that he understood what had occurred.

A pretrial conference was held on the scheduled trial date—April 16, 2007—at which time Wells expressly waived his right to a speedy trial, in exchange for the State's dismissal of another charge. It appears from the record that the State wanted Wells to testify in another, unrelated, proceeding and would be willing to reach a plea agreement on the pending charge after Wells testified. It was later discovered that Wells' proposed testimony was untruthful. On September 20, Wells filed a motion to discharge on speedy trial grounds.

A hearing was held on the motion to discharge, at which hearing Wells testified that he was "under the impression" that the case had been set for trial on February 23, 2007. Wells claimed he had never been told that the case was set for trial on April 16.

The district court, after examining the bill of exceptions, found that Wells had expressly consented to several continuances, including the disputed January 19, 2007, continuance. Therefore, the court found that the speedy trial period had not elapsed before the April 16 hearing at which Wells waived his speedy trial rights. The district court denied the motion to discharge, and Wells appealed.

ASSIGNMENT OF ERROR

Wells assigns that the district court erred by overruling his motion to discharge. In his brief, Wells argues specifically that the court erred in finding that he requested a continuance on January 19, 2007.

In its brief, the State contends that we should overrule our decisions in *State v. Gibbs*[2] and *State v. Jacques*,[3] and hold that

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[2] *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

[3] *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

an order overruling a motion to discharge based on speedy trial grounds is not a final, appealable order.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[4]

ANALYSIS

Nebraska's speedy trial statutes provide that "[e]very person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section."[5] We note that § 29-1207 was recently amended to change the date upon which the speedy trial period commences to run for certain offenses,[6] but that change is not relevant here, and we cite to the current version of the statute for the sake of simplicity and convenience.

[2] To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.[7] One such excludable period is "[t]he period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel."[8] The delay caused by a continuance is not a complete waiver of the right to a speedy trial; rather, the delay caused by a continuance granted for the defendant is excluded from the 6-month period and counted against the defendant.[9] For purposes of this analysis, we assume, without deciding, that Wells' April 16, 2007, waiver of his speedy trial rights was of no effect.

Wells argues in this case that the district court clearly erred in finding that the period between January 19 and April 16,

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[4] *State v. Williams*, *ante* p. 133, 761 N.W.2d 514 (2009).

[5] § 29-1207(1).

[6] See 2008 Neb. Laws, L.B. 623.

[7] *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

[8] § 29-1207(4)(b).

[9] *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001).

2007, was excludable. But the record contradicts Wells' argument. The record, as set forth above, affirmatively establishes that Wells asked for a continuance on January 19, agreed to a trial date of April 16, and acknowledged that the period between those dates would not count for speedy trial purposes. Perhaps Wells misunderstood—but the district court correctly advised him, and the record provides ample support for the court's factual findings that Wells requested a continuance on January 19 and that the period between January 19 and April 16 was excludable. Wells' sole assignment of error is without merit.

For the sake of completeness, we note the State's argument that we should overrule our decisions in *Gibbs*[10] and *Jacques*,[11] and hold that an order overruling a motion to discharge based on speedy trial grounds is not a final, appealable order. We recently rejected an identical argument in *State v. Williams*[12] and stand by our reasoning and conclusion in that opinion.

Specifically, as in *Williams*, we are not persuaded by the State's argument that interlocutory appeals of this kind are subject to unlimited abuse by the defendant. We noted in *Williams* that "the right to appeal is triggered by denial of a 'nonfrivolous claim' of violation of the statutory right to a speedy trial."[13] As should be apparent from our discussion above, the merits of Wells' claim were dubious. But neither the district court nor this court was asked to decide whether Wells' speedy trial claim, or his appeal, was frivolous. Moreover, if the State is concerned about delay, and questions the merits of an appeal, then this court's rules—particularly § 2-107(B)(2)—provide the State with an effective means of expediting appellate review.[14]

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[10] *Gibbs*, *supra* note 2.

[11] *Jacques*, *supra* note 3.

[12] *Williams*, *supra* note 4.

[13] *Id.* at 140, 761 N.W.2d at 521-22, quoting *Gibbs*, *supra* note 2.

[14] See Neb. Ct. R. App. P. § 2-107(B).

CONCLUSION

We again decline the State's invitation to overrule our decisions in *Gibbs*[15] and *Jacques*.[16] But the district court did not clearly err in overruling Wells' motion to discharge, and its order is affirmed.

AFFIRMED.

[15] *Gibbs, supra* note 2.

[16] *Jacques, supra* note 3.

MARLO JOHNSON AND JENNIFER JOHNSON, APPELLANTS, V. CITY OF KEARNEY, NEBRASKA, APPELLEE.

763 N.W.2d 103

Filed April 3, 2009. No. S-07-1194.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Special Assessments: Appeal and Error.** In an appeal from the levy of special assessments, the party contesting the assessment has the burden of showing invalidity.
3. **Taxation: Appeal and Error.** An appeal from a board of equalization is tried by the district court de novo.
4. **Special Assessments: Evidence: Appeal and Error.** On appeal from an action brought pursuant to Neb. Rev. Stat. § 19-2422 (Reissue 2007), an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Municipal Corporations: Ordinances: Improvements.** A city council's determination whether or not there are a sufficient number of objections to challenge an ordinance, and prevent a city from going forward with a paving district, is an exercise of a city council's judicial function.
6. **Municipal Corporations: Appeal and Error.** When an entity such as a city council is exercising its judicial functions, the petition in error statute is the proper method for challenging such actions.
7. ____: ____. A city council is a tribunal whose decision can be reversed, vacated, or modified through the petition in error process set forth in Neb. Rev. Stat. § 25-1901 (Reissue 2008).
8. **Special Assessments: Improvements: Words and Phrases.** Special assessments are charges imposed by law on land to defray the expense of a local municipal

improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general.

9. **Special Assessments.** The amount of a special assessment cannot exceed the amount of benefit conferred on the property assessed.
10. **Special Assessments: Improvements: Valuation.** The board of equalization's valuation of the benefits conferred is not limited to the present use made of the improvement, but extends to the use which might reasonably be made of the improvement in the future.
11. **Special Assessments: Presumptions.** Absent evidence to the contrary, it will be presumed that the amount of the special assessment was arrived at with reference only to the benefits which accrued to the property affected.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Arthur R. Langvardt for appellants.

Justin R. Herrmann and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellants, Marlo Johnson and Jennifer Johnson, challenged the creation of a paving and improvement district in general and the validity of a special assessment levied against their property in particular. After trial, the district court for Buffalo County concluded that the paving and improvement district was properly created, affirmed the special assessment, and entered judgment in favor of appellee, City of Kearney. Appellants appeal from this judgment, claiming both that the ordinance creating the district is void due to objections filed against the creation of the district pursuant to Neb. Rev. Stat. § 16-620 (Reissue 2007) and that the special assessment levied against appellants' property was excessive. Although we conclude that the district court did not have authority to consider the validity of the ordinance, we nevertheless conclude that the special assessment was proper and, therefore, affirm.

STATEMENT OF FACTS

Appellants are the owners of real estate abutting the east side of south Central Avenue in Kearney, Nebraska, described as "[t]he westerly 250 feet of Tax Lot 12, in Government Lot 8, in Section 12, Township 9 North, Range 16 West of the 6th P.M., Buffalo County, Nebraska, lying North of the North line of Talmadge Street, if extended." In this action, appellants are challenging the passage of the ordinance creating paving and improvement district No. 2000-822 along Central Avenue and the special assessment levied on their property described above.

Central Avenue is a north-south street. Appellants' property runs approximately from Interstate 80 on the south to a channel of the Platte River on the north. At the time the special assessment was levied on the property, appellants conducted various businesses on the property, including a fish hatchery, a "Fort Kearney Museum" tourist attraction, glass-bottom boat rides, a taxidermy studio, house rentals, and a commercial game farm. Appellants contend that most of their property at issue in this case consists of ponds or lakes.

On February 8, 2000, the Kearney City Council adopted ordinance No. 6621, which created paving and improvement district No. 2000-822. District No. 2000-822 called for the widening of a section of Central Avenue from a 24-foot-wide street to a 36-foot-wide street and also called for curbs, gutters, and new storm sewers.

Appellants prepared a written petition objecting to the proposed district and circulated the petition among the landowners abutting the affected portion of Central Avenue. Consistent with § 16-620, discussed below, the objections were filed with the Kearney city clerk within 20 days of the first publication of ordinance No. 6621. The parties stipulated at trial that the objections contained the signatures of more than 50 percent of the landowners subject to the special assessment.

The objections were filed pursuant to § 16-620 in an attempt to prevent the district from being constructed. Section 16-620 states:

> If the owners of the record title representing more than fifty percent of the front footage of the property abutting or adjoining any continuous or extended street, cul de sac, or alley of the district, or portion thereof which is closed at one end, and who were such owners at the time the ordinance creating the district was published, shall file with the city clerk, within twenty days from the first publication of said notice, written objections to the improvement of a district, said work shall not be done in said district under said ordinance, but said ordinance shall be repealed. If objections are not filed against any district in the time and manner aforesaid, the mayor and council shall forthwith proceed to construct such improvement.

The 20-day period for filing objections to the ordinance creating the paving and improvement district ended on March 2, 2000. Following the filing of the objections, for reasons not clearly identified in the record, individuals requested that their names be withdrawn from the objections. On March 14, the city council met and accepted a report from the clerk to the effect that after the filing of the withdrawal letters, only 47.01 percent of the landowners were still objecting to the ordinance. Based on this recommendation, the city found that there were insufficient objections to the ordinance. Construction followed.

Two and a half years later and after construction of improvements, on November 12, 2002, the city council, sitting as a board of equalization, heard objections to a proposed special assessment to pay for the construction. Appellants appeared at the hearing and objected to the amount and validity of the proposed special assessment levied against their property. The council voted in favor of the special assessment and levied an assessment in the amount of $30,686.04 against appellants' property.

In their brief filed with this court, and at oral argument, appellants stated that they filed a notice of appeal in the district court for Buffalo County pursuant to Neb. Rev. Stat. §§ 19-2422 and 19-2423 (Reissue 2007), which permit a property owner to appeal the validity and the amount of a special assessment,

and appellants paid the requisite $200. See § 19-2423. In their petition on appeal filed with the district court on December 11, 2002, appellants alleged that the ordinance creating the district should be repealed based on the objections filed under § 16-620 and further that the special assessment levied against their property was excessive.

A trial was held on July 23, 2007. The director of public works for the city and the city engineer testified as to the condition of the district prior to the paving project and stated that there was a 24-foot-wide asphalt road surface; the area was considered a rural section in the city; and much of Central Avenue in the district had ditches and grass, soil, and gravel shoulders. The director of public works testified that before the creation of the district, he had received a number of complaints from businesses concerned with mud, ponding of water, and the lack of drainage. The city officials testified that the district widened Central Avenue, eliminated the ditches, and replaced them with a new drainage system consisting of the widened concrete paved surface of the roadway itself and curbing and inlets facilitating drainage to the storm sewers. Appellants' property also received four concrete driveway approaches.

The city engineer testified as to the method for determining front footage in order to make the assessment. The city engineer prepared the original map for the district, which showed the front footage of various lots to be assessed within the district. He then eliminated from the measurements front footage of property that had been assessed for a state project completed 2 years earlier, in an effort not to assess property for improvements already made, and eliminated other front footage that was not assessable for various reasons. Appellants were assessed $30,686.04 for 691 feet of assessable front footage. The city engineer testified that this amounted to "$40.20 . . . per foot" and that in his opinion, the nature of the benefits received by all landowners was equal.

Through their evidence, appellants attempted to show that prior to the creation of the district, there was essentially a newly paved 24-foot road. Appellants contested the city's assertion that there was ponding of water in the area where the

district was built and challenged the need for new storm sewers. In argument, appellants challenged the ordinance and the creation of the district.

On October 26, 2007, the district court entered judgment in favor of the city. With respect to the propriety of the ordinance creating the district, the court concluded that objectors may properly withdraw their objections until such time as the city repeals the newly created ordinance. The court thereby approved of the ordinance and the creation of the district. The court next found that the paving project did in fact enhance appellants' property. Specifically, the district court noted that the road was widened; temporary asphalt was replaced with permanent concrete; roadside ditches were replaced with curbing, gutters, and additional drainage; soil and gravel were removed; and modern lighting was installed. The assessment was affirmed. Appellants appeal.

ASSIGNMENTS OF ERROR

Appellants contend that the district court erred by (1) concluding that the city council could consider withdrawals of previously filed written objections until such time as the city, should it choose, repeals the newly created ordinance and (2) finding that appellants' property received special benefit by reason of the work done under the paving and improvement district.

STANDARDS OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[2-4] In an appeal from the levy of special assessments, the party contesting the assessment has the burden of showing invalidity. See *NEBCO, Inc. v. Board of Equal. of City of Lincoln*, 250 Neb. 81, 547 N.W.2d 499 (1996). An appeal from a board of equalization is tried by the district court de novo. § 19-2422. On appeal from an action brought pursuant to § 19-2422, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the

trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See *Purdy v. City of York*, 243 Neb. 593, 500 N.W.2d 841 (1993). See, also, *NEBCO, Inc.*, *supra*.

ANALYSIS

On appeal, appellants claim in general that the ordinance creating the paving and improvement district should have been repealed based on the number of objections initially filed pursuant to § 16-620 and, in particular, that the special assessment levied against appellants' property by the district created by the ordinance was excessive. The district court found that no procedural defect occurred in the creation of the paving and improvement district and that because the paving and improvement project did in fact enhance appellants' property, the special assessment levied on appellants' property was not excessive.

The District Court Had No Authority to Address the Validity of the Ordinance Creating the Paving and Improvement District.

In their brief to this court, and at oral argument, appellants state that their appeal to the district court was taken pursuant to §§ 19-2422 and 19-2423. Section 19-2422 states in part that

> [a]ny owner of real property who feels aggrieved by the levy of any special assessment by any city of the first or second class or village may appeal from such assessment, both as to the validity and amount thereof, to the district court of the county where such assessed real property is located.

The city questions the authority of the district court to determine the validity of the ordinance creating the district in this case, which was filed under § 19-2422. We agree with the city that the district court did not have authority to rule on the propriety of the ordinance in this case brought under § 19-2422.

Appellants appear to believe that the language in § 19-2422, which allowed them as owners of real property to challenge in district court the validity and amount of a special assessment levied against them, also gave the district court jurisdiction over their challenge to the city council's underlying finding that there were an insufficient number of objections under § 16-620 to repeal the new ordinance and inhibit the creation of the paving and improvement district. Appellants' belief is in error.

By its terms, § 19-2422 gives the owner of real property the authority to challenge the validity and the amount of the levy assessed. Nowhere in the language of § 19-2422 does the statute give an owner of real property the authority to challenge a city council's determination as to the sufficiency of the objections filed under § 16-620 or the propriety of the ordinance and the creation of the district.

[5-7] This court has held that a city council's determination whether or not there are a sufficient number of objections to challenge an ordinance, and prevent a city from going forward with a paving district, is an exercise of the city council's judicial function. See *Hiddleson v. City of Grand Island*, 115 Neb. 287, 212 N.W. 619 (1927). When an entity such as a city council is exercising its judicial functions, the petition in error statute is the proper method for challenging such actions. Neb. Rev. Stat. § 25-1901 (Reissue 2008) states that "[a] judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court . . . ." A city council is a tribunal whose decision can be reversed, vacated, or modified through the petition in error process set forth in § 25-1901. See, e.g., *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991). A petition in error must be brought within 30 days of the decision sought to be challenged. Neb. Rev. Stat. § 25-1931 (Reissue 2008).

In this case, appellants should have challenged the city council's determination as to the sufficiency of the objections through the petition in error statute and should have done so within 30 days. Appellants' petition filed in December

2002 challenging the city council's March 2000 decision regarding the propriety of the newly enacted ordinance was out of time.

For completeness, we note that appellants refer us to *Foote Clinic, Inc. v. City of Hastings*, 254 Neb. 792, 580 N.W.2d 81 (1998), and suggest that their appeal is timely. However, in *Foote Clinic, Inc.* the appellants' challenge was brought as a declaratory judgment action, and appellants in this case acknowledged that they did not bring a declaratory judgment action. *Foote Clinic, Inc.* is therefore inapposite. Because the aspect of appellants' case challenging the validity of the ordinance was not timely, the district court was without authority to rule on the propriety of the city council's decision regarding the sufficiency of the objections under § 16-620. Appellants' challenge to this portion of the district court's decision is without merit.

The Special Assessment Levied Against Appellants' Property Was Not Excessive.

[8,9] Special assessments are charges imposed by law on land to defray the expense of a local municipal improvement on the theory that the property has received special benefits from the improvements in excess of the benefits accruing to property or people in general. *Bennett v. Board of Equal. of City of Lincoln*, 245 Neb. 838, 515 N.W.2d 776 (1994). The amount of a special assessment cannot exceed the amount of benefit conferred on the property assessed. *Id.*; *Brown v. City of York*, 227 Neb. 183, 416 N.W.2d 574 (1987). We have observed:

> "'An assessment may not be arbitrary, capricious, or unreasonable but the law does not require that a special assessment correspond exactly to the benefits received. . . . The most any officer or any tribunal can do in this regard is to estimate the benefits to each tract of real estate upon as uniform a plan as may be in the light afforded by available information.'"

NEBCO, Inc. v. Board of Equal. of City of Lincoln, 250 Neb. 81, 86, 547 N.W.2d 499, 503 (1996) (quoting *Bennett, supra*).

[10,11] The board of equalization's valuation of the benefits conferred is not limited to the present use made of the

improvement, but extends to the use which might reasonably be made of the improvement in the future. *Brown, supra*. Absent evidence to the contrary, it will be presumed that the amount of the special assessment was arrived at with reference only to the benefits which accrued to the property affected. *Id*. It is the property owner who challenges the special assessment who has the burden of establishing its invalidity. *Id*.

After our de novo review of the record, we cannot say the board's decision to approve the special assessment was arbitrary, capricious, or unreasonable. At trial, the city established that the paving and improvement district was essentially a rural section within the city limits and that much of Central Avenue in the district had ditches and grass, soil, and gravel shoulders. The city officials testified that there had been complaints about the ponding of water in ditches, the poor road conditions, and improper drainage in the district. The officials testified that the ponding of water created a problem with insects and debris gathering in the ditches and created icy conditions in the winter and that the poor road conditions created problems with dust and dirt.

The city then set forth evidence that the paving and improvement district made improvements to the property by widening the street, updating the sewage system, modernizing the lighting, and replacing dirt and soil with curbing. The officials testified that these improvements addressed many of the problems complained of by the residents and business owners. The city engineer also testified as to the method used in determining the amount of the assessment and the steps taken to ensure that the assessment was fair and uniform among all landowners assessed.

In response to the city's evidence, appellants claimed that the road the city replaced met their needs and did not need to be replaced, and challenged the city's contention that prior to the creation of the district, there was "ponding" on some of the land in the district. Appellants do not, however, argue that the city did not improve the road, and this court has held that there is a presumption at law that all real estate is benefitted to some degree from the improvement of a street or alley on which it

abuts. See *Bitter v. City of Lincoln*, 165 Neb. 201, 85 N.W.2d 302 (1957).

The bulk of the evidence presented by appellants at trial was testimony by appellant Marlo Johnson that he had not experienced any drainage problems prior to the creation of the district, but had noticed standing water at some of his rental properties since the creation of the district. However, Marlo Johnson admitted that he was not aware whether individuals complained to the city of ponding. It is appellants' burden to rebut the presumption in favor of the assessment, and based on this record, appellants did not set forth sufficient evidence refuting the benefits of the improvement, as described by the city officials, or show that the assessment was arbitrary, capricious, or unreasonable. See *NEBCO, Inc. v. Board of Equal. of City of Lincoln*, 250 Neb. 81, 547 N.W.2d 499 (1996). Therefore, we conclude that appellants did not rebut the presumption that the assessment levied pursuant to the creation of paving and improvement district No. 2000-822 benefited appellants' property.

CONCLUSION

Although we conclude that the district court was without authority to determine the issue of the validity of the ordinance, we, nevertheless, affirm the decision of the district court which found that appellants did receive a benefit to their property and which affirmed the special assessment.

AFFIRMED.

STATE OF NEBRASKA EX REL. GLENN R. LANMAN AND TERESA J. LANMAN, APPELLANTS, V. BOARD OF COUNTY COMMISSIONERS OF DAWSON COUNTY, NEBRASKA, ET AL., APPELLEES, AND SANITARY AND IMPROVEMENT DISTRICT NO. 1 OF GOSPER COUNTY AND DAWSON COUNTY, NEBRASKA, INTERVENOR-APPELLEE.

763 N.W.2d 392

Filed April 3, 2009. No. S-07-1201.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Interventions.** As a prerequisite to intervention under Neb. Rev. Stat. § 25-328 (Reissue 2008), the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. In determining whether such a direct and legal interest exists, it does not matter whether the interests are already adequately represented by another.
5. ____. Whether a party has the right to intervene in a proceeding is a question of law.
6. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
7. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act.
8. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
9. ____. Where statutory construction is called for, a court looks to the statute's purpose and then construes the statute in a reasonable manner that will best achieve that purpose, rather than interpreting the statute in a way that would defeat its purpose.

10. ____. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS, Judge. Affirmed.

Terry K. Barber and Joshua D. Barber, of Barber & Barber, P.C., L.L.O., for appellants.

Kurt R. McBride, Chief Deputy Dawson County Attorney, for appellees.

Robert J. Huck and David J. Skalka, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C., for intervenor-appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

The principal issue in this appeal is one of statutory interpretation. Neb. Rev. Stat. § 17-201 (Reissue 2007) permits the incorporation of a village upon the petition of "a majority of the taxable inhabitants of any town or village, not incorporated under any laws of this state." The issue presented here is whether this statute permits the incorporation of a village lying entirely within the boundaries of an existing sanitary and improvement district.

BACKGROUND

In 2003, a petition was filed in the district court for Gosper County seeking the formation of Sanitary and Improvement District No. 1 of Gosper County and Dawson County (SID No. 1) pursuant to Neb. Rev. Stat. §§ 31-727 to 31-793 (Reissue 1998 & Supp. 2003). Several persons, including Glenn R. Lanman and Teresa J. Lanman, objected to the formation of the district, but their objections were overruled by the court. On February 10, 2005, the court entered an order granting the petition and declaring SID No. 1 to be "a public corporation of this state." The order stated that SID No. 1 would "encompass all of the property abutting Johnson Lake" and the "centerline

of the paved road which surrounds the lake (Johnson Lake Drive)." In an appeal brought by the objectors, we affirmed this order.[1] Additional facts pertinent to the formation of SID No. 1 are set forth in that opinion. Briefly summarized, the area around Johnson Lake was experiencing increased problems with wastewater treatment and disposal, and concerned residents determined that "an SID would be the best governing vehicle to facilitate the development and operation of a centralized wastewater system."[2]

After the issuance of our opinion affirming the formation of SID No. 1, the Lanmans and some of their neighbors who lived along Johnson Lake submitted a signed petition to the Board of County Commissioners of Dawson County (Board) seeking incorporation of "The Village of Johnson Lake" pursuant to § 17-201. The land described in the plat of the proposed village was situated entirely within the boundaries of SID No. 1. Acting on the advice of the Dawson County Attorney, the Board denied the petition because the proposed village was situated entirely within an already incorporated area. The Lanmans then commenced a mandamus action against the Board and the individual commissioners, alleging that upon receipt of the petition, they had a ministerial duty pursuant to § 17-201 to declare the village incorporated and declare its metes and bounds. SID No. 1 was granted leave to intervene and filed an answer in intervention in which it asserted various defenses, including an allegation that the proposed village could not be lawfully incorporated because it was entirely within the boundaries of SID No. 1, a municipal corporation.

Subsequently, the Board, the commissioners, and SID No. 1 filed a joint motion for summary judgment. After conducting an evidentiary hearing, the district court granted the motion. It reasoned that the Board's denial of the petition was correct as a matter of law because the petition failed to comply with the signature requirements of § 17-201 and because the village could not legally be incorporated within the boundaries of SID

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[1] *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[2] *Id.* at 859, 708 N.W.2d at 814.

No. 1. The Lanmans filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

ASSIGNMENTS OF ERROR

The Lanmans assign, restated, consolidated, and renumbered, that the district court erred in (1) allowing SID No. 1 to intervene, (2) determining that a village may not be incorporated within the boundaries of a sanitary and improvement district, (3) determining that the petition seeking incorporation of the village did not meet the statutory requirements, and (4) sustaining the Board's objection to an exhibit at the evidentiary hearing.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[5]

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

ANALYSIS

Intervention

We first address the issue of whether the district court erred in giving SID No. 1 leave to intervene in the mandamus action. The Lanmans argue both that SID No. 1 lacked a direct and

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[4] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[5] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

[6] *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008); *Niemoller v. City of Papillion*, 276 Neb. 40, 752 N.W.2d 132 (2008).

legal interest necessary for intervention and that the intervention was procedurally improper.

[4,5] Intervention in Nebraska civil actions is generally governed by Neb. Rev. Stat. §§ 25-328 to 25-330 (Reissue 2008). Section 25-328 provides:

> Any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action between any other persons or corporations, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendants in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and before the trial commences.

As a prerequisite to intervention under this statute, the intervenor must have a direct and legal interest of such character that the intervenor will lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action.[7] In determining whether such a direct and legal interest exists, it does not matter whether the interests are already adequately represented by another.[8] Whether a party has the right to intervene in a proceeding is a question of law.[9] SID No. 1 alleged the right to intervene because formation of the village would improperly detach and remove property from within SID No. 1's boundaries and tax base without compliance with the statutory requirements for detachment. For purposes of determining the right to intervene, we must assume that these allegations are true.[10] We conclude that SID No. 1 alleged interests sufficient to permit it to intervene in the mandamus action.

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[7] *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006).

[8] See *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

[9] *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008); *Spear T Ranch v. Knaub*, *supra* note 7.

[10] See *Spear T Ranch v. Knaub*, *supra* note 7.

Procedurally, SID No. 1 sought leave to intervene by motion, which is inconsistent with the language in § 25-330 providing that "intervention shall be by complaint." Under a prior version of the statute requiring that intervention be by "petition," we treated a motion setting forth the claimed basis for intervention as a petition for intervention.[11] The motion filed by SID No. 1 set forth its claimed basis for intervening in the case, and after the motion was sustained, SID No. 1 filed an answer in intervention. This answer was a proper pleading, as SID No. 1 intervened on behalf of the respondents in resisting the claim seeking a writ of mandamus. We have stated that intervention statutes are to be liberally construed.[12] Applying such construction here, we find no procedural bar to intervention and conclude that the district court did not err in granting SID No. 1 leave to intervene.

MANDAMUS

[6,7] The Lanmans, as relators, sought a writ of mandamus compelling the Board to declare the incorporation of the village of Johnson Lake pursuant to their petition. Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.[13] In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act.[14]

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[11] *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002). See § 25-330 (Reissue 1995).

[12] *Ruzicka v. Ruzicka*, *supra* note 8.

[13] *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007); *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

[14] *State ex rel. Stivrins v. Flowers*, 273 Neb. 336, 729 N.W.2d 311 (2007).

Whether the Board had a legal obligation to act in this case must be determined from the language of § 17-201, which provides in relevant part:

> Whenever a majority of the taxable *inhabitants of any town or village, not incorporated under any laws of this state*, shall present a petition to the county board of the county in which the petitioners reside, praying that they may be incorporated as a village and designating the name they wish to assume and the metes and bounds of the proposed village, and such county board or majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition and that inhabitants to the number of one hundred or more are actual residents of the territory described in the petition, the board shall declare the proposed village incorporated, enter the order of incorporation upon its records, and designate the metes and bounds thereof. Thereafter the village shall be governed by the provisions of law applicable to the government of villages.

(Emphasis supplied.) Assuming without deciding that the petition bore the requisite number of signatures, we focus on the question of whether the petitioners were "inhabitants of any town or village, not incorporated under any laws of this state."

[8] We look first to the literal meaning of the statutory language, because in the absence of ambiguity, courts must give effect to statutes as they are written.[15] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[16] Read literally, the language of § 17-201 would prohibit the incorporation of a village within any existing public corporation. Each Nebraska county is characterized by statute as "a body politic and corporate."[17]

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[15] See, *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008); *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[16] *Id*.

[17] Neb. Rev. Stat. § 23-101 (Reissue 2007).

A county is a political subdivision of the state which is "corporate in character."[18] Thus, under a literal reading of § 17-201, because a county itself is a corporate entity, none of its inhabitants could ever incorporate any area within its boundaries as a village. But this literal reading of the statute would lead to an absurd result, which we are bound to avoid if possible.[19] We therefore conclude that § 17-201 is ambiguous and open to construction.

[9] Where statutory construction is called for, a court looks to the statute's purpose and then construes the statute in a reasonable manner that will best achieve that purpose, rather than interpreting the statute in a way that would defeat its purpose.[20] Section 17-201 presupposes the existence of a "village" in the ordinary and popular sense of the term, meaning a small urban community consisting of an assemblage of residences and having a density of population greater than usually found in rural areas.[21] The statute provides a means by which inhabitants of such a community may "incorporate" as a "village" in the narrower legal sense of the term in order to avail themselves of the provisions of § 17-201 and the other laws applicable to villages.[22] However, the statutory means to incorporate a village is limited by the phrase "not incorporated under any laws of this state."[23] We understand this phrase as referring to the territory situated within the boundaries of the proposed village, and we reject the Lanmans' argument that the phrase refers to the petitioning inhabitants. We have previously interpreted the statute as requiring that "the

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[18] *Speer v. Kratzenstein*, 143 Neb. 310, 313, 12 N.W.2d 360, 362 (1943).

[19] See, *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[20] *In re Application of City of North Platte*, 257 Neb. 551, 599 N.W.2d 218 (1999).

[21] *State ex rel. Little v. Board of County Commissioners*, 182 Neb. 419, 155 N.W.2d 351 (1967). See *State v. Dimond*, 44 Neb. 154, 62 N.W. 498 (1895).

[22] See Neb. Rev. Stat. § 17-201.01 et seq. (Reissue 2007).

[23] § 17-201.

area is a town or village, not incorporated under the laws of this state."[24]

The verb "incorporate" means "[t]o form a legal corporation . . . ."[25] Thus, we read the term "incorporated" as used in § 17-201 to mean the formation of a public corporate entity comprising previously unincorporated territory. The dispositive issue is the scope of the next phrase, "under any laws of this state." The Lanmans argue that the phrase should be read narrowly to mean simply that taxable inhabitants of an unincorporated village may petition to incorporate as a village under § 17-201. The Board, the commissioners, and SID No. 1 argue that the phrase is more expansive and prohibits the incorporation of a village within the boundaries of any public or municipal corporation formed pursuant to Nebraska statutes.

[10] Had the Legislature intended only that inhabitants of villages which had not been previously incorporated under § 17-201 could utilize the statute to incorporate, it could have said so simply and directly. Indeed, it would have been unnecessary to include any limiting language, as there would be no reason for inhabitants of an already incorporated village to petition for incorporation. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[26] By using the broad language "under any laws of this state," the Legislature clearly intended that incorporation as a village was not permissible if the area of the proposed village had previously been incorporated under any Nebraska statute.

Sanitary and improvement districts are formed pursuant to § 31-727 et seq. The statutes provided that "[n]o lands included within any municipal corporation shall be included in any sanitary and improvement district"[27] and that upon formation,

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[24] *State ex rel. Little v. Board of County Commissioners*, *supra* note 21, 182 Neb. at 422, 155 N.W.2d at 353 (emphasis supplied).

[25] Black's Law Dictionary 781 (8th ed. 2004).

[26] *Niemoller v. City of Papillion*, *supra* note 6; *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

[27] § 31-730. Accord § 31-761(3).

a sanitary and improvement district is declared by a court to be "a public corporation of this state"[28] and exists as a "body corporate and politic"[29] having

> the power and authority to take and hold real and personal property necessary for its use, to make contracts, to sue and be sued, to have and use a corporate seal, and to exercise any and all other powers, as a corporation, necessary to carry out the purposes of sections 31-727 to 31-762.[30]

Based upon these statutes, this court has noted that a sanitary and improvement district "cannot be considered unincorporated."[31] We have also held that sanitary and improvement districts are municipal corporations within the meaning of statutes pertaining to payment of warrants.[32] We therefore conclude that a sanitary and improvement district is a public corporate entity within the boundaries of which a village may not be incorporated pursuant to § 17-201. Accordingly, the Board had no legal obligation to declare the existence of the proposed village of Johnson Lake, and the Lanmans were not entitled to a writ of mandamus.

Remaining Assignments of Error

Based upon our resolution of this question of law, we conclude that the district court did not err in entering summary judgment in favor of the Board, the commissioners, and SID No. 1. We do not reach the Lanmans' remaining assignments of error because an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[33]

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[28] § 31-730.

[29] § 31-732.

[30] *Id*.

[31] *State ex. rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 389, 527 N.W.2d 615, 619 (1995).

[32] *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989); *In re Application of S.I.D. No. 65*, 219 Neb. 647, 365 N.W.2d 456 (1985).

[33] *Cass Cty. Bank v. Dana Partnership*, 275 Neb. 933, 750 N.W.2d 701 (2008).

CONCLUSION

For the reasons discussed, we find no reversible error and affirm the judgment of the district court.

AFFIRMED.

GERRARD, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM C. FLOYD, JR., APPELLANT.
763 N.W.2d 91

Filed April 3, 2009. No. S-08-018.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Trial: Juries: Appeal and Error.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.
5. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
6. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Rules of Evidence: Appeal and Error.** Findings of fact made by a district court pursuant to Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 2008), are reviewed by an appellate court for clear error.
8. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

9. **Evidence: Other Acts: Intent: Proof.** Prior acts evidence may be offered for the purpose of proving intent where intent is an element of the charged offense.
10. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
11. **Criminal Law: Intent: Proof.** While motive is not an element of first degree murder, any motive for the crime charged is relevant to the State's proof of the intent element.
12. **Rules of Evidence: Words and Phrases.** Pursuant to Neb. Evid. R. 404(1)(b), Neb. Rev. Stat. § 27-404(1)(b) (Reissue 2008), in order to be admissible, the evidence in question must be of a pertinent trait of character. "Pertinent" is synonymous with "relevant," which is defined in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).
13. ____: ____. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008), defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
14. **Jury Misconduct: Verdicts.** In order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.
15. **Jury Misconduct: New Trial.** In order for jury misconduct to be the basis for a new trial, the misconduct must not only occur but it must be prejudicial to the defendant.
16. **Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

William C. Floyd, Jr., was convicted of first degree murder and manslaughter of an unborn child. Floyd was sentenced to

life imprisonment on the murder conviction and 20 to 20 years' imprisonment on the manslaughter conviction. Floyd appeals certain evidentiary rulings, as well as the district court's denial of his motion for mistrial and motions to strike certain jurors. We affirm.

FACTUAL BACKGROUND

On July 30, 2004, Floyd was charged with first degree murder, manslaughter of an unborn child, and being a felon in possession of a weapon. Floyd was originally convicted in 2005 of these charges; however, the murder and manslaughter convictions were reversed on appeal by this court as the result of improper communication between the jury and a bailiff.[1]

Floyd was retried. Following a jury trial, he was again convicted of first degree murder and manslaughter of an unborn child. Floyd was sentenced to life imprisonment on the murder conviction and 20 to 20 years' imprisonment on the manslaughter conviction.

The charges against Floyd arose out of the shooting death of Destiny Davis, who was pregnant at the time of her death. The evidence establishes that on October 7, 2003, Davis and several other individuals, including Davis' sister, Shantelle Vickers, were in the living room in a home in Omaha, Nebraska. Just before 10:30 p.m., Vickers left the living room for the bathroom. The other individuals, including Davis, remained in the living room. While in the bathroom, Vickers heard gunshots. Those gunshots were fired from outside the living room window. Davis and two others were hit; Davis and her unborn child were killed. Vickers testified that after hearing the gunshots, she looked out the bathroom window and saw a man she identified as Floyd outside the house.

The State's theory of prosecution was that Vickers, who had previously been romantically involved with Floyd, was the intended victim of the shooting. In support of this theory, Vickers testified as to her combative relationship with Floyd, including specific incidents in which Floyd acted in a violent

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[1] *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

manner toward her. In particular, Vickers testified to four separate incidents: one on January 21, 2003; another sometime in the fall of 2003; one on October 6, 2003; and one in the afternoon on October 7, 2003, the day of the shooting. Floyd objected to the introduction of all but the October 7 incident. Floyd's motion in limine was denied. The court concluded that the prior history of violence went not to Floyd's propensity for violence, but to Floyd's motive or intent to commit the crimes charged.

Voir dire in this case was held on August 20 and 21, 2007. At the conclusion of the first day of voir dire, the jury was admonished to not "read, view or listen to any reports about this case . . . . If any accounts of this case do come to your attention, you must immediately disregard them."

An Omaha World-Herald newspaper article regarding the trial was published during the jury selection process and appeared in both the August 20, 2007, evening edition and the August 21 morning edition of the newspaper. Based upon the publication of the article, Floyd motioned for a mistrial. The court reserved ruling on the motion and conducted an inquiry into the jury pool's exposure to the article.

During its inquiry, eight members of the jury panel admitted exposure to the article in some form. Each member of the panel was questioned separately. Four prospective jurors were struck for cause at the conclusion of their individual questioning; another two prospective jurors were excused for cause at the conclusion of all questioning. At that time, the district court also denied Floyd's motion for mistrial.

Floyd also objected to the two remaining members of the panel, both of whom eventually sat on the jury. The district court denied those motions. The questioning of juror D.W. established that he saw the newspaper of a fellow prospective juror and noticed a headline that contained the words "Floyd," "retrial," and "2003." D.W. indicated that once he saw the name and year, he "just looked down," and that he could not tell what the exact headline was and had no idea why a retrial was necessary. As for juror F.W., she testified that she was skimming the newspaper and saw the name "William Floyd" and that she "quickly put it [the newspaper] into the trash, I mean, as fast as

I probably have in my life." F.W. denied seeing or reading any other information from the article.

ASSIGNMENTS OF ERROR

On appeal, Floyd contends, restated, that the district court erred in (1) admitting evidence of specific incidents of Floyd's abuse of Vickers; (2) basing its ruling on the admissibility of evidence pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 2008), in part on testimony from a prior rule 404 hearing; (3) using an incorrect definition of "clear and convincing" in deciding whether the State met its burden under rule 404; (4) refusing to admit evidence of specific incidents of violence by Vickers toward her former and current husbands; and (5) denying Floyd's motion to strike or motion for mistrial due to the fact that several prospective jurors were exposed to a newspaper article regarding Floyd's retrial.

STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[2] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.[3]

[3] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and rule 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[4]

[4,5] The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court and is subject to reversal only when clearly wrong.[5] The decision whether to

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[2] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

[3] *Id.*

[4] See *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

[5] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[6]

ANALYSIS

Rule 404 Evidence.

In his first assignment of error, Floyd contends that the district court erred in admitting evidence of specific acts of abuse he allegedly committed against Vickers. In connection with this assignment of error, Floyd also argues that the district court erred in considering evidence from a prior hearing and in utilizing the wrong standard when concluding that the State had met its burden of showing that he, in fact, committed the prior conduct testified to by Vickers.

We first consider Floyd's allegation that the district court improperly considered testimony from a previous hearing in concluding that evidence of specific incidents of Floyd's abuse of Vickers was admissible.

Prior to Floyd's first trial, a rule 404 hearing was held with regard to the previous abuse of Vickers. Upon retrial, the trial court declined to take judicial notice of the prior hearing and instead held a new hearing. At this new hearing, Vickers was cross-examined extensively with respect to her testimony at the first hearing. The district court then referenced this testimony in its rule 404 order, noting that Vickers' testimony was generally consistent with that prior testimony.

Contrary to Floyd's assertion that the district court relied upon this prior testimony when making its rule 404 determination, a review of the order makes it clear that such reference was instead done in response to Floyd's counsel's continual attacks on Vickers' credibility. Other than in regard to Vickers' credibility, there is no indication the district court relied on any of the previous testimony in reaching its conclusion that the evidence of specific incidents of Floyd's abuse of Vickers was admissible.

Floyd next alleges that the district court relied upon an incorrect standard when concluding the State had met its burden of

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[6] *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

introducing the prior acts. Section 27-404(3) provides in relevant part that in order to be admissible, the State must prove by clear and convincing evidence that the defendant committed the prior acts. In the district court's order, it acknowledged such clear and convincing standard and suggested that this court had not yet defined clear and convincing evidence in the rule 404 context. The order then referenced a definition of "clear proof" taken from an Iowa Supreme Court case as "helpful," though it noted that it was not "controlling precedent."

[6] We note that under these circumstances, the decision to cite the Iowa authority in question was inapt, particularly since that authority did not explicitly define the term "clear and convincing." We also note that, in fact, "clear and convincing evidence" has been previously defined under Nebraska law. To the extent it was not clear before, we specifically note that the definition of that term is the same in this context as it is in every other context under Nebraska law. It is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[7]

Nevertheless, we disagree with Floyd's characterization of the district court's order. While the order undisputedly refers to a "clear proof" standard, it also explicitly notes that the standard is not controlling. At various other points in the order, the district court again notes that it is applying a clear and convincing evidence standard. And the district court concludes the relevant portion of the order by noting that "the State has met the threshold requirement imposed by Rule 404(3)," which is the standard of clear and convincing evidence. Indeed, the district court not only found that the State had met the requirements of § 27-404(3), but in its order, also noted that "[the] evidence describes criminal conduct and is sufficient to warrant submission to a trier of fact if [Floyd] had been charged with such crimes." We further note that other than quoting the "clear proof" standard at the beginning of its analysis, the district court does not rely on that language when reaching its conclusion. Floyd's argument that the district court relied upon an incorrect standard is without merit.

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[7] *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984).

[7] And to the extent Floyd is also arguing that the State failed to prove by clear and convincing evidence that Floyd committed the specific incidents of prior abuse toward Vickers, we disagree. Pursuant to § 27-404(3), we review the district court's findings of fact in such an instance for clear error.[8] In this case, we find no clear error in those factual findings, and therefore, we conclude that the State proved by clear and convincing evidence that Floyd committed the acts at issue.

Finally, we turn to Floyd's contention that the district court erred in admitting evidence of specific incidents of abuse committed by Floyd and against Vickers. In this instance, we review the district court's order for an abuse of discretion. The admissibility of such evidence is controlled by § 27-404. Subsection (1) generally provides that "[e]vidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith . . . ." However, subsection (2) further provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[8] An appellate court's analysis under § 27-404(2) considers whether the (1) evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[9]

Therefore, we first consider whether the evidence of prior bad acts was relevant for some purpose other than to show

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[8] Cf., *State v. Wenke*, 276 Neb. 901, 758 N.W.2d 405 (2008); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005); *State v. Neal*, 265 Neb. 693, 658 N.W.2d 694 (2003); *State v. Poe*, 266 Neb. 437, 665 N.W.2d 654 (2003).

[9] *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

Floyd's propensity to commit the crimes charged in this case. The State argued, and the district court agreed, that evidence of specific instances of Floyd's abuse of Vickers was admissible in order to show Floyd's motive or intent.

In this case, the State's theory of prosecution was that Vickers was the intended victim of the shooting but that, by mistake, Floyd intentionally killed Davis. The jury was instructed on transferred intent. The State argues that this instruction, as well as the State's theory of prosecution, would have made little sense to the jury unless it was given some history regarding Floyd and Vickers' relationship and Floyd's motive or intent to kill Vickers. The State therefore contends that evidence of Floyd's abuse of Vickers was relevant to show that Floyd had the motive or intent to kill Vickers.

[9-11] We have held that prior acts evidence may be offered for the purpose of proving intent where intent is an element of the charged offense.[10] And motive is defined as that which leads or tempts the mind to indulge in a criminal act.[11] While motive is not an element of first degree murder, any motive for the crime charged is relevant to the State's proof of the intent element.[12]

Evidence of the prior incidents of abuse against Vickers by Floyd is probative with respect to the nature of Floyd's relationship with Vickers and the hostility he held toward her. And without evidence of such relationship and hostility, the State's transferred intent theory would make little sense. We therefore conclude that Floyd's prior abuse of Vickers was relevant to establish Floyd's motive or intent with respect to the charges against him.

Having concluded that the evidence of Floyd's prior abuse of Vickers was relevant for proper purposes under § 27-404(2), we next consider whether the probative value of such evidence is outweighed by its potential for unfair prejudice.

As an initial matter, we note Floyd argues that the district court never engaged in an analysis under § 27-403. However,

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[10] See *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000).

[11] *Id.*

[12] See, *id.*; *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996).

our review of the district court's order does not support this contention. To the contrary, the district court's order includes a section entitled "Rule 403." It is clear that the district court analyzed this issue and explicitly concluded that "the probative value of the testimony is not outweighed by a danger of unfair prejudice."

An analysis under § 27-403 requires a court to weigh the probative value of particular evidence against the danger of unfair prejudice. As was concluded above, the evidence of Floyd's prior abuse is probative as to his motive or intent to harm Vickers; without its introduction, the State's theory of prosecution makes little sense.

In considering whether this value is outweighed by the danger of unfair prejudice, we note that the number of incidents to which Vickers testified was limited by the State. Moreover, three of the four incidents in question all happened within a few months of Davis' murder, the earliest was less than 9 months prior. Such proximity in time to the shooting suggests a higher probative value than if the incidents had been more remote in time. We, too, conclude that the probative value of the evidence of Floyd's prior abuse was not substantially outweighed by the potential for unfair prejudice.

Finally, we note that limiting instructions were given by the district court before Vickers testified to each instance of abuse.

We conclude that the district court did not abuse its discretion in admitting evidence of specific incidents of Floyd's abuse of Vickers. Floyd's first, second, and third assignments of error are therefore without merit.

Admissibility of Vickers' Prior Bad Acts.

In his fourth assignment of error, Floyd contends that the district court erred in not allowing him to introduce evidence of "specific incidents of Vickers' assaultive behavior [toward her former and current husbands] to combat the allegations" that Vickers was abused by Floyd.[13] Floyd contends that his inability to introduce such acts limited his ability to attack

[13] Brief for appellant at 27.

Vickers' credibility. Again, we note that we review the district court's rulings regarding the admissibility of evidence for an abuse of discretion.

As was noted above, § 27-404(1) generally provides that "[e]vidence of a person's character or a trait of his or her character is not admissible for the purposes of proving that he or she acted in conformity therewith . . . ." There are exceptions to this general rule. As relevant in this case, § 27-404(1) provides as follows:

> (b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor. . . . or
>
> (c) Evidence of the character of a witness as provided in sections 27-607 to 27-609 [dealing with the impeachment of witnesses].

[12,13] Assuming without deciding that Vickers is a victim within the meaning of the statute, § 27-404(1)(b) would nevertheless be inapplicable. In order to be admissible, the evidence in question must be of a pertinent trait of character. "'[P]ertinent'" in the context of Fed. R. Evid. 404(a) is synonymous with "'relevant,'"[14] which is defined in Fed. R. Evid. 401, as well as in Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008). Section 27-401 defines "[r]elevant evidence" as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

We conclude, however, that any evidence of specific instances of Vickers' assaultive behavior is not pertinent to this case. That Vickers and her former and current husbands might have had violent relationships is of no consequence when considering whether Floyd had the motive or intent to harm Vickers or whether he in fact fired the shot that killed Davis and her unborn child. As such, any specific instances of

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[14] *United States v. Angelini*, 678 F.2d 380, 381 (1st Cir. 1982).

Vickers' behavior do not fall within the exception provided by § 27-404(1)(b).

Nor is the evidence admissible to impeach Vickers' credibility under § 27-404(1)(c). The ability of a party to attack the credibility of a witness is set forth in Neb. Evid. R. 607 to 609, Neb. Rev. Stat. §§ 27-607 to 27-609 (Reissue 2008). Section 27-608 provides:

> (1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: (a) The evidence may refer only to character for truthfulness or untruthfulness . . . .
>
> (2) Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in section 27-609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness (a) concerning his character for truthfulness or untruthfulness . . . .

In this case, whether Vickers might have engaged in assaultive behavior in relationships with her former and current husbands is not probative to the truthfulness of her testimony that Floyd had the motive or intent to shoot her, or her testimony that Floyd fired the shot that killed Davis. As such, the evidence in question would be inadmissible to attack Vickers' credibility.

The district court did not abuse its discretion by refusing to admit evidence of Vickers' prior assaultive behavior. Floyd's fourth assignment of error is without merit.

Motion to Strike/Motion for Mistrial Regarding Jurors' Exposure to Newspaper Article.

In his fifth and final assignment of error, Floyd argues that the district court erred in not granting his motion for mistrial or, in the alternative, motion to strike jurors D.W. and F.W. as a result of their exposure to a newspaper article.

Neb. Rev. Stat. § 29-2006 (Reissue 2008) provides in relevant part:

> The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment: . . . (2) that he has formed or expressed an opinion as to the guilt or innocence of the accused; *Provided*, if a juror or alternate juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror or alternate juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case . . . .

In this case, Floyd's argument that the motions to strike D.W. and F.W. should have been granted is without merit. There is simply no evidence to suggest that D.W. or F.W. had even formed an opinion about Floyd's guilt. At most, there is some evidence that both D.W. and F.W. saw Floyd's name in a newspaper headline and, in accordance with the district court's admonition, "immediately disregard[ed]" it. We therefore conclude that the district court did not abuse its discretion in denying Floyd's motion to strike these two jurors.

[14-16] Nor did the district court abuse its discretion in denying Floyd's motion for mistrial. In order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.[15] In order for jury misconduct to be the basis for a new trial, the misconduct must

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[15] *State v. Anderson*, 252 Neb. 675, 564 N.W.2d 581 (1997).

not only occur but it must be prejudicial to the defendant.[16] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.[17]

This court's decision in *State v. Anderson*[18] is helpful. In *Anderson*, we held that jury misconduct occurred when several jurors read a newspaper headline about the defendant's retrial and then discussed the headline with other jurors. Despite this misconduct, however, we concluded that the defendant failed to meet his burden of showing that his right to a fair trial was prejudiced by the misconduct. We noted:

> The examination of the jurors in this cause by the trial court and both counsel failed to disclose either directly or inferentially that any of the jurors had been prejudiced by their exposure to the headline or subhead in question. Even though three of the jurors acknowledged that the subhead stated that the instant cause was a retrial, none of the jurors exhibited any knowledge as to the circumstances of the retrial or whether the first trial was terminated prior to its conclusion or was reversed on appeal. The mere use of the word retrial, without further explanation, does not automatically connote that a defendant was convicted of particular crimes in a prior trial, nor does it necessarily mean that a prior trial had reached its completion. Simply put, none of the jurors testified that they had any knowledge regarding a prior conviction or as to why [the defendant] was being granted a new trial.[19]

As an initial matter, we question whether D.W.'s and F.W.'s actions in reading a portion of the headline of the article in question constituted jury misconduct. Unlike the jurors

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[16] See *id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 684, 564 N.W.2d at 587.

in *Anderson*, who had the contents of the headline brought to their attention and then proceeded to discuss it, there is no evidence that suggests that D.W. or F.W. discussed the contents of the headline with anyone. In fact, the record establishes that F.W. threw the newspaper away "as fast as I probably have in my life." And D.W. indicated that he saw the article's headline and "just looked down" to avoid seeing anything further.

Moreover, we conclude that Floyd has failed to meet his burden of showing that his right to a fair trial was prejudiced by the alleged misconduct. We noted in *Anderson* that the "mere use of the word retrial" was not, on its own, prejudicial. And as in *Anderson*, there is nothing in the record that would suggest either D.W. or F.W. had any knowledge as to Floyd's prior conviction or as to why he was being granted a new trial. In fact, with respect to F.W., there is no evidence that she was even aware that Floyd's trial was a retrial. We therefore also conclude that the district court did not abuse its discretion in denying Floyd's motion for mistrial.

Floyd's fifth and final assignment of error is without merit.

CONCLUSION

Floyd's convictions and sentences are affirmed.

AFFIRMED.

IN RE ESTATE OF JOHN T. RONAN, SR., DECEASED. CHARLES H. WISEMAN, APPELLANT, V. JEAN T. RUWE AND DANIEL H. RUWE, COPERSONAL REPRESENTATIVES OF THE ESTATE OF JOHN T. RONAN, SR., DECEASED, APPELLEES.

763 N.W.2d 704

Filed April 3, 2009. No. S-08-062.

1. **Real Estate: Sales: Agents.** Pursuant to the Nebraska Real Estate License Act, Neb. Rev. Stat. §§ 81-885.01 to 81-885.55 (Reissue 2008), any person collecting a fee or commission on the sale of real estate must be a licensed real estate broker or salesperson unless he or she meets one of the exceptions provided in the act.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

3. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
4. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.

Appeal from the County Court for Dodge County: KENNETH VAMPOLA, Judge. Affirmed.

Nicholas J. Lamme, of Yost, Schafersman, Lamme, Hillis, Mitchell & Schulz, P.C., L.L.O., for appellant.

Bradley D. Holtorf and Shane J. Placek, of Sidner, Svoboda, Schilke, Thomsen, Holtorf, Boggy & Nick, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

John T. Ronan, Sr., owned real estate that he wished to sell. Ronan agreed to pay the appellant, Charles H. Wiseman, a 4-percent commission if he found a buyer for the property. Wiseman found a purchaser for the real estate; however, Ronan died before paying Wiseman the commission. Wiseman filed this action seeking payment of the commission from Ronan's estate.

[1] Pursuant to the Nebraska Real Estate License Act (Act),[1] any person collecting a fee or commission on the sale of real estate must be a licensed real estate broker or salesperson unless he or she meets one of the exceptions provided in the Act. One such exception is when an individual is performing his or her duties as an attorney at law. The primary question presented in this case is whether Wiseman was exempted from the licensing requirement of the Act by performing duties as an attorney.

We conclude that Wiseman is barred from recovering any compensation for his services, because he acted as a broker under the Act without obtaining a real estate license and did not meet the requirements of the attorney exception.

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[1] See Neb. Rev. Stat. §§ 81-885.01 to 81-885.55 (Reissue 2008).

FACTS

Ronan owned real estate in Costa Rica that he wished to sell. To facilitate the sale, Ronan, through his attorney, contacted Wiseman. At the time, Wiseman was licensed to practice law in Nebraska and South Carolina. Wiseman was not, however, a licensed real estate broker or salesperson under the Act.

Ronan wrote a letter to his personal attorney stating that if Wiseman "succeeds in introducing someone who actually buys the property, he will receive 4% of the selling price ($32,000.00)." Wiseman introduced Ronan to one of his clients, Thomas Ploskina, as a potential buyer. After the introduction, Ploskina traveled to Nebraska to meet with Ronan and discuss the property. During the negotiation, Wiseman performed various legal services for Ploskina, including some due diligence regarding the possible purchase of the property. As the discussions progressed, Wiseman, on behalf of Ploskina, drafted a "Letter of Understanding" proposing that Ploskina would purchase the property. But the letter was never signed, and Ronan rejected Ploskina's offer.

Apart from one telephone call with Ronan, Wiseman had no further involvement in the transaction. Eventually, Ploskina purchased the property through a corporation he formed with two others. The corporation was represented throughout the purchase of the property by a separate attorney. Ronan's attorney from Costa Rica attended the closing. Wiseman was not present at the closing on the property. Ronan died before paying Wiseman any commission.

Wiseman filed a statement of claim against Ronan's estate for breach of contract for "[f]ailure to pay a finder[']s fee" of 4 percent. The copersonal representatives of Ronan's estate disallowed the claim, and the issue was presented to the county court. The court found that Wiseman's claim for payment from Ronan was for a commission for the sale of the Costa Rica real estate and was not for services rendered in performance of his duty as an attorney at law. The court concluded that the commission was not exempt from the Act and granted summary judgment in favor of the estate. Wiseman appeals.

ASSIGNMENT OF ERROR

Wiseman assigns, consolidated and restated, that the county court erred in finding that Wiseman did not meet the exception to the license requirement of the Act contained in § 81-885.04(2).

STANDARD OF REVIEW

[2-4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[2] Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[4]

ANALYSIS

The Act requires that all persons who act as real estate brokers, as defined therein, in exchange for a fee, must be licensed by the State Real Estate Commission.[5] And if a person acts as a real estate broker without a license, he or she cannot recover compensation for it, unless he or she falls within one of the statutory exceptions to the licensure requirement.[6] As relevant in this case, § 81-885.04(2) states that the Act does not apply to "[a]n attorney in fact under a duly executed power of attorney to convey real estate from the owner or lessor or the services rendered by any attorney at law in the performance of his or her duty as such attorney at law."

Wiseman argues that the county court erred in finding that he did not meet the § 81-885.04(2) exception to the license

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[2] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

[3] *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[4] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

[5] See § 81-885.02.

[6] See § 81-885.06.

requirement of the Act. Wiseman asserts that because the services he provided to both Ronan and Ploskina were legal services, he was exempt from the Act's license requirement.

We turn first to the legal services Wiseman alleges he provided to Ronan. In essence, Wiseman claims that by acting as an attorney for Ronan, he was acting as an "attorney in fact under a duly executed power of attorney to convey real estate from the owner or lessor."[7] As proof that he was acting as Ronan's attorney, Wiseman points to his affidavit. In the affidavit, Wiseman asserted that he "was acting as an Attorney for . . . Ronan as confirmed by him in the Sixth paragraph of a letter to my father, Mike Wiseman, from . . . Ronan . . . dated December 9, 2004 in which Ronan confirmed that I was performing legal services by stating that I would have 'legal charges.'"

However, Wiseman's bare conclusion that he was acting as Ronan's attorney is not supported by the record. In his deposition, Wiseman admitted that he was not performing legal work for Ronan and was not Ronan's attorney. Wiseman also admits that when the Costa Rica real estate transaction was completed, Ronan had another attorney. There is no evidence in the record that Wiseman performed any services for Ronan that would have required him to be a member of the bar or that Wiseman actually conveyed property under a power of attorney. Based on the record, we conclude that Wiseman was not acting as an attorney for Ronan and therefore was not excluded from the license requirement of the Act.

Wiseman also claims that he is exempted from the license requirement because he was acting as an attorney for Ploskina. This argument is presumably based on the second part of § 81-885.04(2), which excludes from the license requirement "the services rendered by any attorney at law in the performance of his or her duty as such attorney at law." Wiseman claims that because he was providing services in the performance of his duty as an attorney at law—even if not for the owner or lessor of the real estate—he is exempt from the license requirement. Wiseman points to a number of instances he claims are

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[7] See § 81-885.04(2).

services in the performance of his duty as an attorney at law for Ploskina, including communicating to Ronan about an interested buyer, placing Ploskina in contact with Ronan to arrange a property inspection, and advising on various due diligence issues and proposals to purchase the property.

We conclude, however, that these "services rendered" were not in the performance of Wiseman's duty as an attorney at law; rather, Wiseman was to collect a "finder's fee" for facilitating the sale of real property—duties of a real estate broker. As we read the statute, the exception of § 81-885.04(2) is limited to those instances where an attorney is acting within the scope of his duties as an attorney.

And more importantly, the services Wiseman allegedly provided to Ploskina are not the services for which Wiseman is now seeking payment. There is no indication in the record that Ronan, or Ronan's estate, would somehow be liable for legal services Wiseman provided to Ploskina. The exception of § 81-885.04(2) extends to "services rendered by an attorney at law in the performance of his or her duty as such attorney at law." Even if Ronan rendered services to Ploskina in the performance of his duty as an attorney at law—a contention that is unsupported by the record—those legal services are not the subject of this claim. Instead, this claim is for the services provided to Ronan—which, as noted above, were not legal services.

In short, Wiseman's services were not within the exception provision of § 81-885.04(2). There is no connection between the activities undertaken by Wiseman and any professional services he was furnishing as an attorney. The agreement between Ronan and Wiseman was for Wiseman to locate a buyer for the Costa Rica property in exchange for a "finder's fee." The services contracted to be performed were those of a real estate broker within the terms of the Act, and therefore, Wiseman was required to have a broker's license. Wiseman's assignment of error is without merit.

CONCLUSION

Wiseman's claim sought compensation for services that required a license under the Act. Because Wiseman did not

have a license, the county court correctly concluded that his claim was barred by § 81-885.06. The court's order granting Ronan's motion for summary judgment is affirmed.

AFFIRMED.

WILLIAM MCKENNA, APPELLANT, V. JASON JULIAN AND THE CITY OF OMAHA, A POLITICAL SUBDIVISION, APPELLEES.

763 N.W.2d 384

Filed April 3, 2009. No. S-08-183.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Pleadings: Proof.** Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.
3. **Actions: Public Officers and Employees: Immunity.** When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.
4. **Political Subdivisions Tort Claims Act.** Tort actions against the state and its political subdivisions are prosecuted pursuant to the Political Subdivisions Tort Claims Act.
5. **Jurisdiction: Governmental Subdivisions: Immunity.** Sovereign immunity deprives a trial court of subject matter jurisdiction for lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit.
6. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, provides that the state may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought and is interpreted to mean that the state is permitted to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
7. ____: ____: ____: ____. Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the state's sovereign immunity.
8. **Political Subdivisions Tort Claims Act: Legislature: Immunity: Negligence.** The Legislature, through the Political Subdivisions Tort Claims Act, has removed, in part, the traditional immunity of subdivisions for the negligent acts of their employees.
9. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act prescribes the procedure for maintenance of a suit

against a political subdivision and also provides a list of claims for which sovereign immunity is not waived.

10. ____: ____: ____. The exceptions to the Political Subdivisions Tort Claims Act's waiver of sovereign immunity include any claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
11. ____: ____: ____. An appellate court strictly construes the Political Subdivisions Tort Claims Act in favor of the political subdivision and against the waiver of sovereign immunity.
12. **Constitutional Law: Immunity: Waiver.** The existence of a self-executing constitutional right does not entail waiver of the state's sovereign immunity from suit based upon such a right.
13. **Constitutional Law: Legislature: Immunity: Waiver.** When a constitutional provision is self-executing, unless it specifically includes language implicating sovereign immunity, it merely creates a right that does not need further legislative action in order to become operable against nonsovereigns.
14. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.
15. **Courts: Immunity: Waiver: Equity.** The judiciary does not have the power to waive sovereign immunity regardless of the equities of the case.
16. **Political Subdivisions Tort Claims Act: Public Officers and Employees.** Where a claim against an employee of a political subdivision is based upon acts or omissions occurring within the scope of employment, it is governed by the provisions of the Political Subdivisions Tort Claims Act.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Daniel W. Ryberg for appellant.

Thomas O. Mumgaard, Deputy Omaha City Attorney, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

William McKenna brought suit against the City of Omaha and Jason Julian, a City of Omaha police officer (collectively the City of Omaha), seeking damages for alleged constitutional violations. McKenna argues that his rights were violated under the Nebraska Constitution and that the Nebraska Constitution provides him with a direct cause of action for damages against

the political subdivision and its employee. The district court dismissed McKenna's complaint for failure to state a claim for which relief can be granted. McKenna appeals.

BACKGROUND

Because this case was dismissed on the pleadings, the circumstances instigating this case will be recounted based on McKenna's complaint. On December 9, 2005, two Omaha police officers, including Julian, made certain comments to McKenna's wife somewhere near McKenna's business establishment. McKenna alleges that he expressed his displeasure to the officers in a nonvulgar manner and then walked into the kitchen of his establishment. The officers followed McKenna into the establishment and ordered him out of the kitchen. McKenna maintains that he complied with the officers' orders but that he was assaulted by Julian under color of law, was cited for a crime, and suffered injuries. McKenna was charged with criminal conduct, and he was found not guilty on all charges.

Subsequently, McKenna filed suit. In his complaint, McKenna alleged four causes of action: (1) false arrest; (2) unconstitutional seizure; (3) excessive use of force; and (4) oppression under color of office, pursuant to Neb. Rev. Stat. § 28-926 (Reissue 2008). McKenna sought relief in the form of money damages.

The City of Omaha filed a partial motion to dismiss and a motion for a more definite statement. In its partial motion to dismiss, the City of Omaha alleged that McKenna's claim under § 28-926 should be dismissed because § 28-926 is purely criminal in nature and does not provide for an independent civil remedy. The City of Omaha also asserted that McKenna's cause of action under § 28-926 was barred by the statute of limitations. The court sustained the City of Omaha's partial motion to dismiss as to § 28-926 and overruled its motion for a more definite statement. The court's dismissal of the § 28-926 claim has not been appealed.

Subsequently, the City of Omaha filed a motion to dismiss as to the remaining causes of action, which motion the district court granted. In its order, the district court concluded that

Neb. Const. art. I, §§ 3 and 7, do not grant McKenna any right to bring an action for civil remedies, because neither section is self-executing. Thus, the district court concluded that there was no authority for McKenna to sue directly under the constitution for the deprivation of rights he was claiming. The district court noted that McKenna failed to cite to any statutory authority as a basis for the causes of action for false arrest under article I, § 3, and unconstitutional seizure under article I, § 7. The district court also concluded that McKenna's causes of action for false arrest, unconstitutional seizure, and excessive use of force arise out of an assault, battery, or false arrest. Thus, McKenna's causes of action fell under the Political Subdivisions Tort Claims Act (PSTCA),[1] which specifically insulates the City of Omaha from liability arising out of such claims. The district court dismissed McKenna's complaint for lack of subject matter jurisdiction. McKenna appeals.

ASSIGNMENTS OF ERROR

McKenna argues that the district court erred in (1) determining that article I, § 3 or § 7, is not self-executing and (2) implicitly concluding that McKenna cannot amend his complaint to state a claim for relief.

STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's grant of a motion to dismiss de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[2] Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.[3]

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[1] Neb. Rev. Stat. §§ 13-901 through 13-926 (Reissue 1997 & Cum. Supp. 2006).

[2] *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

[3] *Id.*

ANALYSIS

Failure to State Claim

[3] McKenna brought this action against Julian, an employee of the Omaha Police Department. When an action is brought against an individual employee of a state agency, a court must determine whether the action against the individual official is in reality an action against the state and therefore barred by sovereign immunity.[4] It is apparent from the allegations contained in McKenna's complaint that the alleged actions by Julian arose within the scope of McKenna's employment with the Omaha Police Department.

McKenna argues that Neb. Const. art. I, §§ 3 and 7, are self-executing and therefore provide him a direct cause of action. Article I, § 3, the due process provision, states: "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." Article I, § 7, the search and seizure provision, states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

[4] Tort actions against the state and its political subdivisions are prosecuted pursuant to the PSTCA.[5] But McKenna urges this court to find an alternative private right of action in damages directly from our state Constitution for alleged violations of his constitutional rights, extending the rationale of the court in *Bivens v. Six Unknown Fed. Narcotics Agents*.[6] McKenna fails to explain, however, how these provisions, even if self-executing, waive our state's sovereign immunity.

[5-7] It is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction

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[4] *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[5] See *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007).

[6] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

for lawsuits in which the state or certain governmental units have been sued, unless the state consents to suit.[7] Neb. Const. art. V, § 22, provides that the state may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought.[8] We have interpreted this provision to mean that the state is permitted to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.[9] We have further explained that this provision is not self-executing, but instead requires legislative action for waiver of the state's sovereign immunity.[10]

[8] The Legislature, through the PSTCA, has removed, in part, the traditional immunity of subdivisions for the negligent acts of their employees.[11] The Legislature declares in the PSTCA that

> no political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and that no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the [PSTCA].[12]

In other words, tort actions against political subdivisions of the State of Nebraska are governed exclusively by the PSTCA.[13]

[9,10] The PSTCA prescribes the procedure for maintenance of a suit against a political subdivision[14] and also provides a list of claims for which sovereign immunity is not waived.[15]

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[7] See *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). See, also, *Livingood v. Meece*, 477 N.W.2d 183 (N.D. 1991).

[8] See *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

[9] *Id.*

[10] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[11] See *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996).

[12] § 13-902.

[13] See, §§ 13-901 through 13-926; *Geddes v. York County, supra* note 5.

[14] *Geddes v. York County, supra* note 5.

[15] See § 13-910.

These exceptions to the PSTCA's waiver of sovereign immunity include: "Any claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[16]

[11] We strictly construe the PSTCA in favor of the political subdivision and against the waiver of sovereign immunity.[17] It is clear that the Legislature has not waived sovereign immunity for McKenna's false arrest claim.

We find nothing in *Bivens*[18] that is relevant to the question of whether the State of Nebraska has waived its sovereign immunity from a claim based on false arrest. In *Bivens*, the U.S. Supreme Court recognized an implied private cause of action against a federal agent acting under color of authority who subjected the plaintiff to a false arrest in violation of the Fourth Amendment to the U.S. Constitution.[19] The Court thus reversed the lower court's dismissal of the plaintiff's claim on the grounds that there was no federal common law or federal statute creating any right of action for false arrest. The Court noted that the power possessed by federal agents, "once granted, does not disappear like a magic gift when it is wrongfully used."[20] But in *Bivens*, the Court did not address sovereign immunity. Under the Federal Tort Claims Act, the U.S. government waived sovereign immunity for certain intentional torts committed by its investigative and law enforcement officers, including false arrest.[21] The Court did not hold that a self-executing constitutional provision, in itself, waives a political subdivision's sovereign immunity.

[12-14] We agree with other courts that have reasoned that the existence of a self-executing constitutional right does not entail waiver of the state's sovereign immunity from suit based

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[16] § 13-910(7).

[17] *Geddes v. York County*, *supra* note 5.

[18] *Bivens v. Six Unknown Fed. Narcotics Agents*, *supra* note 6.

[19] *Id.*

[20] *Id.* at 392.

[21] 28 U.S.C. § 2680(h) (2006).

upon such a right.[22] Instead, when a constitutional provision is self-executing, unless it specifically includes language implicating sovereign immunity, it merely creates a right that does not need further legislative action in order to become operable against nonsovereigns.[23] An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[24] Thus, we need not determine whether the due process and search and seizure provisions of the Nebraska Constitution are self-executing, because that question is not determinative of the outcome of this case.

[15] Despite the Legislature's clear statement that claims based on false arrest, battery, or assault are barred by sovereign immunity, McKenna urges this court to recognize a direct cause of action, because, otherwise, he is without redress. The judiciary does not have the power to waive sovereign immunity regardless of the equities of the case.[25] But we also note that McKenna's assertion that he is without any other remedy is simply not true. In fact, McKenna acknowledges that he has an available remedy under 42 U.S.C. § 1983 (2000), but he has not made a claim under such provision. In Neb. Rev. Stat. § 20-148 (Reissue 2007), the Nebraska Legislature has created a cause of action similar to § 1983:

> (1) Any person or company, as defined in section 49-801, except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

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[22] See, *Figueroa v. State*, 61 Haw. 369, 604 P.2d 1198 (1979); *Ritchie v. Donnelly*, 324 Md. 344, 597 A.2d 432 (1991); *Smith v Dep't of Public Health*, 428 Mich. 540, 410 N.W.2d 749 (1987); *Livingood v. Meece*, *supra* note 7; *Garcia v. Reyes*, 697 So. 2d 549 (Fla. App. 1997).

[23] See *Figueroa v. State*, *supra* note 22.

[24] *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

[25] See, *Hoeings v. County of Adams*, *supra* note 8; Neb. Const. art. V, § 22.

But § 20-148, unlike § 1983, explicitly prohibits actions based on constitutional violations against a political subdivision. This only provides further evidence that our Legislature has not intended to waive sovereign immunity for implied causes of action under our constitution.[26] The district court was correct in concluding that McKenna failed to state a claim upon which the court could grant relief.

Dismissal of Complaint

Next, McKenna argues that the facts alleged in his complaint showed that he had a viable cause of action against the City of Omaha based on Julian's negligent use of excessive force during the false arrest. McKenna argues that this battery action does not fall under the "arising out of assault, battery, false arrest" exception to the PSTCA. Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief.[27] We agree with the district court that viewing the complaint in a light most favorable to McKenna, this action based on excessive force still arises out of claims of false arrest or battery and it is therefore barred as a matter of law by sovereign immunity.

[16] Where a claim against an employee of a political subdivision is based upon acts or omissions occurring within the scope of employment, it is governed by the provisions of the PSTCA.[28] McKenna does not allege, nor does he seem to argue, that Julian acted outside the scope of his employment at the time of the alleged false arrest. McKenna does not allege a negligence claim distinct from Julian's actions giving rise to his false arrest claims. Accordingly, the court was correct in dismissing McKenna's cause of action for excessive use of force.[29]

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[26] See *Board of County Com'rs v. Sundheim*, 926 P.2d 545 (Colo. 1996).

[27] *Kellogg v. Nebraska Dept. of Corr. Servs.*, *supra* note 2.

[28] *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006).

[29] See *Policky v. City of Seward, Neb.*, 433 F. Supp. 2d 1013 (D. Neb. 2006).

In *Johnson v. State*,[30] we concluded that when a cause of action is based on the mere fact of government employment, such as a respondeat superior claim, or on the employment relationship between the intentional tort-feasor and the government, such as a negligent supervision or negligent hiring claim, such claim is barred by the PSTCA, and thus the state is immune from suit. Clearly, McKenna's cause of action for excessive force arises out of the alleged false arrest by Julian, acting within the scope of his employment. McKenna does not plead any facts that would explain how Julian or the City of Omaha would be liable without the connection of the employment relationship between the parties. Therefore, the City of Omaha is protected by sovereign immunity.

CONCLUSION

The district court properly dismissed McKenna's complaint for lack of subject matter jurisdiction, because the claims for which McKenna seeks relief are encompassed by the protections of the PSTCA.

AFFIRMED.

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[30] *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005).

FRANCISCO DOMINGUEZ, APPELLEE, V. EPPLEY TRANSPORTATION SERVICES, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

763 N.W.2d 696

Filed April 3, 2009. No. S-08-408.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

4. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
5. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
6. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Reissue 2008) does not require that the final order be explicitly identified in the notice of appeal.
7. **Fraud: States.** Neb. Rev. Stat. § 36-712 (Reissue 2008) requires that the Uniform Fraudulent Transfer Act be applied and construed in conformity with other states.
8. **Torts: Claims: Judgments: Damages.** A person holding any disputed, contingent, or unliquidated tort or contract claim has no right to enforce payment of damages until a judgment enters against the defendant. Nonetheless, this does not diminish the claim for payment of damages that the plaintiff asserts when filing a lawsuit.
9. **Debtors and Creditors: Judgments: Time: Parties.** A debtor-creditor relationship is created not by a judgment, but by the wrong which produces the injury; and it is the date of the wrongful act, not the date of the filing of the suit or of the judgment, which fixes the status and rights of the parties.
10. **Conveyances: Fraud: Debtors and Creditors.** Under Neb. Rev. Stat. § 36-706(b) (Reissue 2008), a transfer is considered fraudulent when the transfer is made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider knew or reasonably should have known that the debtor was insolvent.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

David A. Domina and Linda S. Christensen, of Domina Law Group, P.C., L.L.O., for appellants.

W. Patrick Betterman, of Law Offices of W. Patrick Betterman, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

I. INTRODUCTION

Eppley Transportation Services, Inc. (ETSI), and Michael J. Abbott and Andi Abbott appeal the decision of the Douglas County District Court granting summary judgment to Francisco Dominguez. Dominguez had obtained a judgment in the U.S. District Court for the District of Nebraska against Abbott Transportation, Inc. (ATI), for employment discrimination. ATI

subsequently transferred all of its assets to ETSI, a new corporation, and Dominguez sought to enforce his judgment against ETSI based on the doctrines of successor liability and fraudulent conveyance, as well as the equitable principle of piercing the corporate veil.

The district court granted summary judgment on the issue of corporate successor liability and found that a conveyance made from ATI to the Abbotts was fraudulent. ETSI and the Abbotts contend the district court erred in granting summary judgment on the issue of the fraudulent conveyance, but conceded the issue of successor liability at oral arguments. Dominguez claims this court lacks jurisdiction to hear the appeal, because ETSI and the Abbotts filed their appeal from a nonexistent final order. We find this court does have jurisdiction over the appeal, and we affirm the decision of the district court.

II. BACKGROUND

Dominguez worked for ATI prior to 2003. ATI was incorporated in Nebraska in 1999 by the Abbotts (then known as Michael J. Schmid and Zorica Schmid), the sole shareholders and directors. The Abbotts also own Abbott Parking, Inc. (API), which owned a parking lot near Eppley Airfield in Omaha, Nebraska. ATI was formed to transport travelers between the parking lot and the airport. The Abbotts were the only officers, directors, and shareholders of ATI and API at all relevant times.

Dominguez filed a complaint in federal district court against ATI for a "national origin" discrimination claim on December 23, 2003. After the complaint was filed, ATI issued a promissory note on August 20, 2004, in the amount of $647,071.61, payable to the Abbotts, to memorialize the outstanding loans the Abbotts had made to ATI over the course of ATI's existence.

On December 31, 2004, the Abbotts held a special meeting of the board of directors and shareholders to determine how to dispense of a debt of $119,038.59 owed to ATI by API. Acting in their official capacities, the Abbotts transferred the $119,039.59 receivable to themselves from API, to be offset against the debt owed to them by ATI (the December 2004

transfer). ATI then issued a new promissory note to the Abbotts in the amount of $544,538.32. The Abbotts followed corporate formalities during their meeting, including memorializing the minutes and filing corporate documents.

On May 27, 2005, after a jury trial, Dominguez obtained a judgment against ATI in federal district court for $79,479.22 plus interest, attorney fees, and costs. On August 11, the federal district court ruled that ATI would be entitled to a new trial if Dominguez did not agree to a remitted damages amount, because there was insufficient evidence to support the amount of lost wages awarded by the jury. The same day, ATI transferred all its assets to ETSI. The list of assets included five vehicles, a camera, and a printer. The transfer was made in consideration of ETSI's assumption of the lien notes on three of the vehicles and two loans.

The bill of sale is dated August 11, 2005, but ETSI's articles of incorporation were not filed until a week later. As with ATI and API, the Abbotts were the only shareholders, officers, and directors of ETSI. Although ATI ceased to do business in August 2005, ETSI used the same vehicles to perform the same service of shuttling passengers between the parking lot and the airport, and ETSI employed essentially the same personnel. API continued to operate as usual.

Shortly thereafter, Dominguez accepted the remitted damages and the U.S. District Court entered an amended judgment in favor of Dominguez in the amount of $83,088.56, plus interest from and after May 31, 2005. Dominguez has been unable to collect any part of the judgment.

On October 19, 2006, Dominguez filed a complaint in Douglas County District Court against ETSI and the Abbotts, alleging they were liable for the judgment entered against ATI. Dominguez later moved for summary judgment on all counts. On March 14, 2008, the district court granted Dominguez' motion for summary judgment on the claims of successor liability and fraudulent conveyance, but not on the issue of piercing the corporate veil.

On April 4, 2008, Dominguez moved to dismiss against ETSI and the Abbotts the remaining claim of piercing the corporate veil, which was not disposed of on summary judgment,

and requested a final judgment. The district court granted the motion and entered a final order 7 days later. ETSI and the Abbotts filed a notice of appeal on April 14, citing a nonexistent March 17, 2008, order.

III. ASSIGNMENT OF ERROR

After conceding the issue of corporate successor liability during oral arguments, ETSI and the Abbotts assign as error that the district court erred when it entered summary judgment on Dominguez' fraudulent conveyance claim.

IV. STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[1]

[2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

[3,4] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[3] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[4]

[5] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[5]

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[1] *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

[2] *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[3] *Id*.

[4] *Eggers v. Rittscher*, 247 Neb. 648, 529 N.W.2d 741 (1995).

[5] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

V. ANALYSIS

1. Whether This Court Has Jurisdiction to Hear Case

We first address the issue of whether this court has jurisdiction. Dominguez has alleged this court does not have jurisdiction, because ETSI and the Abbotts entered their notice of appeal based on "the final Order entered by the District Court of Douglas County, Nebraska, on March 17, 2008 [sic] when the District Court sustained the Plaintiff's Motion for Summary Judgment." Summary judgment was granted on March 14, 2008, and the final order was entered on April 11. ETSI and the Abbotts contend they are not required to identify the order from which they appeal within the notice of appeal.

Neb. Rev. Stat. § 25-1912 (Reissue 2008) governs the filing of an appeal. Section 25-1912(1) states:

> The proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the entry of such judgment, decree, or final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record . . . .

Section 25-1912(2) states that if a notice of appeal or docket fee is filed "after the announcement of a decision or final order but before the entry of the judgment, decree, or final order," it shall be treated as filed or deposited after the entry of the final judgment.

[6] We have previously held that a notice of appeal filed before a final order has been entered has no effect.[6] That is not the case here, however, because the notice of appeal was filed on April 14, 2008, after the entry of the final order on April 11. Section 25-1912 does not require that the final order be explicitly identified. Furthermore, § 25-1912(2) states that a notice of appeal filed after a final order is announced but

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[6] See *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002).

before entry of judgment will be considered to have been filed after the entry of judgment. In this case, the notice of appeal was filed within 30 days after entry of the final order. Although the best practice would be to identify the correct final order of judgment in the notice of appeal, the notice did comply with all explicit statutory requirements. We therefore find that this court has jurisdiction to decide the case.

2. Transfer Was Fraudulent

We next turn to ETSI and the Abbotts' sole remaining claim. ETSI and the Abbotts allege the district court erred in awarding summary judgment on Dominguez' fraudulent conveyance claim. Dominguez alleged that the December 2004 transfer made from ATI to the Abbotts, repaying $119,039.59 of debt, was a fraudulent conveyance under Nebraska's Uniform Fraudulent Transfer Act (UFTA), Neb. Rev. Stat. §§ 36-701 to 36-712 (Reissue 2008). The district court found the conveyance was fraudulent as a matter of law under § 36-706(b). Judgment was entered against the Abbotts personally under § 36-709(b)(1), because they were "the first transferee[s] of the asset or the person[s] for whose benefit the transfer was made."

Section 36-706(b) states:

> A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider knew or reasonably should have known that the debtor was insolvent.

There is no question that the Abbotts were insiders, that ATI was insolvent, and that the Abbotts knew or reasonably should have known that ATI was insolvent; however, the Abbotts claim that the December 2004 transfer had no value and that Dominguez was not a present creditor, and that for those reasons, Dominguez did not have a claim at the time of the December 2004 transfer.

(a) Transfers for Value

ETSI and the Abbotts first claim that the transfer merely involved "bookkeeping entries" and that nothing of value was

actually exchanged.[7] Section 36-702(12) defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." Section 36-704(a) states that value "is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied."

Although the Abbotts claim that no value was exchanged, the record contradicts that assertion. ATI's 2004 federal tax return lists the debt due from API as an "other current asset" at the beginning of the year, but not at the end of the year—after the December 2004 transfer took place. Furthermore, the Abbotts issued a new promissory note after the December 2004 transfer. The first promissory note, dated August 20, 2004, stated that the amount due from ATI to the Abbotts was $647,071.61. The Abbotts then reissued the promissory note for $544,538.32, after the December 2004 transfer. The UFTA clearly states that value is exchanged when the transfer is made to satisfy an antecedent debt. The first promissory note establishes that there was an antecedent debt; the second demonstrates that the December 2004 transfer was made to secure part of that debt. Therefore, value was exchanged, and a transfer was made.

(b) Present Claims

ETSI and the Abbotts next contend that Dominguez did not have a claim at the time of the December 2004 transfer, as required by § 36-706(b). Under § 36-702(3), a claim is defined as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Under § 36-702(5), a debt is defined as "liability on a claim," while under § 36-702(6), a debtor is defined as "a person who is liable on a claim."

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[7] Brief for appellants at 15.

[7] The district court found that Dominguez' claim arose at the time of ATI's discriminatory conduct and that therefore, for purposes of § 36-706(b), Dominguez was a present creditor when the December 2004 transfer occurred. ETSI and the Abbotts claim that Dominguez did not have a "right to payment" until the judgment was rendered in 2005. We currently do not have any case law regarding when a person with a tort or other legal claim against another becomes a "creditor" for purposes of the UFTA. However, § 36-712 requires that the UFTA be applied and construed in conformity with other states.

[8,9] Courts deciding this issue under the UFTA have held that a "creditor" includes a person with unlitigated legal claims against the debtor.[8] In support of this decision, courts point to the "'whether or not the right is reduced to judgment'" language contained in the definition of "claim."[9] "Certainly, a person holding any disputed, contingent, or unliquidated tort or contract claim has no right to enforce payment of damages until a judgment enters against the defendant. Nonetheless, this does not diminish the claim for payment of damages that the plaintiff asserts when filing a lawsuit."[10] These courts have generally held that a "debtor-creditor relationship is created not by a judgment, but by the wrong which produces the injury; and it is the date of the wrongful act, not the date of the filing of the suit or of the judgment, which fixes the status and rights of the parties."[11]

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[8] *Sands v. New Age Family Partnership, Ltd.*, 897 P.2d 917 (Colo. App. 1995).

[9] *Id.* at 921. See, also, *Friedman v. Heart Inst. of Port St. Lucie*, 863 So. 2d 189 (Fla. 2003); *Gulf Insurance Co. v. Clark*, 304 Mont. 264, 20 P.3d 780 (2001); *Klingman v. Levinson*, 114 F.3d 620 (7th Cir. 1997); *U.S. v. Brickman*, 906 F. Supp. 1164 (N.D. Ill. 1995).

[10] *Sands*, *supra* note 8, 897 P.2d at 921. See, e.g., *Tolle v. Fenley*, 132 P.3d 63 (Utah App. 2006); *Friedman*, *supra* note 9; *Gulf Insurance Co.*, *supra* note 9; *Cox v. Hughes*, 781 So. 2d 197 (Ala. 2000); *Klingman*, *supra* note 9; *Brickman*, *supra* note 9; *Cook v. Pompano Shopper, Inc.*, 582 So. 2d 37 (Fla. App. 1991); *Granberry v. Johnson*, 491 So. 2d 926 (Ala. 1986).

[11] *Granberry*, *supra* note 10, 491 So. 2d at 928.

[10] Based on the requirements of § 36-712 and the decisions of other courts, we find that the district court did not err when it found that Dominguez had a claim at the time the December 2004 transfer took place. Under § 36-706(b), a transfer is considered fraudulent when the transfer is made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider knew or reasonably should have known that the debtor was insolvent. The Abbotts have admitted that ATI was insolvent at the time of the December 2004 transfer, and as the sole shareholders and directors of ATI, the Abbotts were insiders and knew that ATI was insolvent at the time of the December 2004 transfer. Finally, as previously mentioned, the December 2004 transfer was made to secure an antecedent debt, as memorialized by the promissory statements.

Under § 36-708(a)(1), Dominguez is entitled to an avoidance of the December 2004 transfer to the extent necessary to satisfy his judgment. Section 36-709(b)(1) entitles the court to enter judgment against "the first transferee of the asset," which the Abbotts were. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[12] Having viewed the evidence in a light most favorable to ETSI and the Abbotts, we find that the district court did not err in determining that the December 2004 transfer was fraudulent as a matter of law, or in entering judgment against the Abbotts personally. We therefore affirm the judgment of the district court.

VI. CONCLUSION

We have determined we have jurisdiction of this case. We did not address the issue of mere continuation, because that was conceded by the Abbotts during oral arguments. After reviewing the evidence in a light most favorable to ETSI and the Abbotts, we also find that the December 2004 transfer from ATI to the Abbotts was a fraudulent transfer as a

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[12] *Hughes*, *supra* note 2.

matter of law under § 36-706(b), that value was exchanged, and that Dominguez had a prior claim. Under § 36-708(a)(1), Dominguez was entitled to an avoidance of the transfer, and § 36-709(b)(1) allowed the district court to enter judgment against the Abbotts personally. We therefore affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID A. FOURNIER, RESPONDENT.

763 N.W.2d 401

Filed April 10, 2009. No. S-07-1205.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges. If no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral argument is given before disbarment is ordered.
3. ____. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
4. ____. With respect to the imposition of attorney discipline in an individual case, each attorney discipline case is evaluated in light of its particular facts and circumstances.
5. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.

Original action. Judgment of disbarment.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF THE CASE

The Counsel for Discipline of the Nebraska Supreme Court, relator, filed formal charges against David A. Fournier, respondent, alleging Fournier violated his oath of office as an attorney, and violated the Nebraska Rules of Professional Conduct by mishandling funds in his client trust account. Fournier did not respond to the formal charges. Relator moved for judgment on the pleadings. This court entered judgment limited to the facts as pled and reserved ruling on the appropriate discipline until after briefing and oral argument. After reviewing the matter, we conclude that the proper sanction is disbarment.

STATEMENT OF FACTS

Fournier was admitted to the practice of law in the State of Nebraska on September 23, 1997. Fournier has been engaged in the private practice of law in the State of Nebraska. In June 2004, Donna Widhalm hired Fournier to assist her in negotiating with her creditors. By written agreement between Widhalm and Fournier, Widhalm agreed to deposit $275 per month with Fournier, who would retain the funds in his trust account until a settlement could be reached with Widhalm's creditors. From June 2004 through September 2005, Widhalm deposited $4,525 with Fournier. Widhalm also paid Fournier a fee of $500 in June 2004. Fournier never made payments to Widhalm's creditors, nor did he refund Widhalm's funds to her after she repeatedly requested that Fournier do so.

On June 20, 2007, relator received a grievance letter from Widhalm setting forth the allegations discussed above. On September 15, Fournier received a copy of the grievance filed against him by Widhalm. Fournier was instructed by relator to file an appropriate written response within 15 working days. On October 11, Fournier filed a response to Widhalm's grievance, claiming that he returned the funds to Widhalm, but he did not provide relator with evidence to support this statement. On October 12, relator sent a letter to Fournier directing him to provide documentation regarding his handling of Widhalm's funds by October 26, or relator would seek the temporary suspension of Fournier's license.

Fournier did not respond to relator's request. On November 16, 2007, the chairperson of the Committee on Inquiry of the Second Disciplinary District filed with the Nebraska Supreme Court an application for the temporary suspension of Fournier's license to practice law. On November 21, this court issued an order to show cause directing Fournier to show cause why the court should not enter an order temporarily suspending his license to practice law in Nebraska. Service of the order was made on November 23. No response was filed, and no cause was shown by Fournier. This Court then entered an order temporarily suspending Fournier from the practice of law.

On January 29, 2008, relator filed formal charges against Fournier alleging that Fournier's acts and omissions constituted violations of his oath of office as an attorney licensed to practice law in the State of Nebraska as provided by Neb. Rev. Stat. § 7-104 (Reissue 2007) and the following provisions of the Nebraska Rules of Professional Conduct as now codified: Neb. Ct. R. of Prof. Cond. §§ 3-501.4 (communications), 3-501.15 (safekeeping property), and 3-508.4 (misconduct). Fournier was not charged under the now-superseded Code of Professional Responsibility, which governs conduct that occurred prior to September 1, 2005.

Following unsuccessful attempts at personal service, service of the formal charges by publication was completed on June 6, 2008. Fournier had until July 7 to file his answer. No answer was filed. On July 9, relator moved for judgment on the pleadings. On August 28, this court granted judgment on the pleadings as to the facts and set the issue of discipline for briefing and oral argument.

ANALYSIS

[1,2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Smith*, 275 Neb. 230, 745 N.W.2d 891 (2008). An attorney against whom formal charges have been filed is subject to a judgment on the pleadings if he or she fails to answer those charges. *Id*. The disciplinary rules provide that if no answer is filed, the court may dispose of the matter on a motion for judgment on the pleadings as long as an opportunity for oral

argument is given before disbarment is ordered. See Neb. Ct. R. § 3-310(I).

[3] We have stated that the basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008). In the instant case, on August 28, 2008, this court granted relator's motion for judgment on the pleadings as to the facts, and therefore, the only issue before us is the type of discipline to be imposed.

Neb. Ct. R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
>
> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, § 3-310.

[4,5] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances. See *State ex rel. Counsel for Dis. v. Zendejas*, 274 Neb. 829, 743 N.W.2d 765 (2008). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Dortch*, 273 Neb. 667, 731 N.W.2d 594 (2007).

To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, this court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's

present or future fitness to continue in the practice of law. *Id*. We have also noted that the determination of an appropriate discipline to be imposed on an attorney requires consideration of any aggravating or mitigating factors. See *State ex rel. Counsel for Dis. v. Zendejas, supra*.

Relator suggests that the appropriate sanction in this case is disbarment. In considering the appropriate sanction, we note that the evidence in the present case establishes that Fournier failed to return Widhalm's funds held in Fournier's client trust account. The act of withholding funds occurred after September 1, 2005. We are also aware of the fact that Fournier failed to respond to requests from relator for information, failed to respond to the formal charges, and failed to file a brief with this court.

In *State ex rel. Counsel for Dis. v. Watts*, 270 Neb. 749, 708 N.W.2d 231 (2005), we determined that disbarment was an appropriate sanction for an attorney who violated disciplinary rules regarding trust accounts, mishandled client funds, and failed to cooperate with relator during the disciplinary proceedings. Here, as in *Watts*, Fournier has violated disciplinary rules and violated his oath of office as an attorney by mishandling client funds entrusted to him and held in his trust account. There is no record of mitigating factors.

After considering the undisputed allegations of the formal charges, which are established as facts, and the applicable law, we conclude that Fournier should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

We order that Fournier be disbarred from the practice of law in the State of Nebraska, effective immediately. Fournier is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Fournier is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and § 3-310(P) and Neb. Ct. R. § 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

IN RE TRUST CREATED BY JOHN A. NIXON, DECEASED. JOHN A. NIXON FAMILY TRUST ET AL., APPELLEES, V. ROBERT NIXON ET AL., APPELLANTS.

763 N.W.2d 404

Filed April 10, 2009. No. S-07-1353.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Adoption: Constitutional Law: Foreign Judgments.** Adoption decrees are among the judgments to which full faith and credit is due.
3. **Foreign Judgments: Jurisdiction: States.** A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.
4. **Constitutional Law: Statutes: Foreign Judgments: States.** The Full Faith and Credit Clause does not compel a state to substitute the statutes of another state for its own statutes; with regard to judgments, however, the full faith and credit obligation is exacting.

Appeal from the County Court for Douglas County: JEFFREY MARCUZZO, Judge. Affirmed.

John G. Liakos, Michael J. Matukewicz, and Jason R. Fendrick, of Liakos & Matukewicz, L.L.P., for appellants.

David L. Buelt and Carlos E. Noel, of Ellick, Jones, Buelt, Blazek & Longo, for appellee Wells Fargo Bank, N.A.

Heather Voegele-Andersen and Mary A. Donovan, of Koley Jessen, P.C., L.L.O., for appellee Richard Daley.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

The main issue in this appeal is whether an adult adoption, which was valid at the time it was granted in California but would not have been allowed under Nebraska law, is entitled to full faith and credit in determining the beneficiaries of a trust in Nebraska. In this trust administration action, Wells Fargo Bank, N.A. (Wells Fargo), as trustee, sought a determination of the proper beneficiaries of a trust. We affirm the

order of the county court for Douglas County finding that the California adoption decree was entitled to full faith and credit in Nebraska.

STATEMENT OF FACTS

John A. Nixon, Sr. (John Sr.), died in 1965, and his will created a family trust to provide for the maintenance and support of his wife until her death. Upon her death in 1980, under the terms of John Sr.'s will, the trust was divided into two trusts, "Trust A" and "Trust B." The beneficiary of Trust A was John Sr.'s daughter Grace Nixon, who at the time John Sr. executed the will in 1964 was 43 years old, unmarried, and childless. The trust documents provided that upon Grace's death, Trust A was to be divided into as many equal shares as there were living children of Grace and deceased children of Grace who left issue surviving. If Grace died without living children or without issue of deceased children, the assets of Trust A were to be held or distributed as directed by the terms of Trust B. The beneficiaries of Trust B were John Sr.'s son John A. Nixon, Jr. (John Jr.), his wife, and their children. John Jr. and his wife had children living at the time John Sr. executed the will in 1964. Upon the deaths of John Jr. and his wife, Trust B was to be divided among the living children and issue of the deceased children of John Jr.

It appears from the record that Grace did not get along with John Jr. and his wife and children. In 1985, Grace approached her maternal cousin, Richard Daley. Grace told Daley that he could become the beneficiary of Trust A if he agreed to be adopted by her. Daley was approximately 50 years old, and Grace, who was still unmarried and childless, was approximately 64 years old. Daley testified at trial in this matter that one of Grace's purposes for the adoption was to prevent John Jr.'s children from receiving the principal of Trust A upon her death.

Grace filed a petition in California seeking to adopt Daley. The Superior Court of Los Angeles County, California, issued a decree of adoption in 1986. Grace told Daley to keep the adoption secret, and Grace and Daley never resided together after the adoption. Daley's biological father had died, but Daley's

biological mother was still alive in 1986. She did not relinquish her parental rights, and her parental rights were not terminated prior to Grace's adoption of Daley. Daley did not tell his biological mother about the adoption, and they continued their usual parent-child relationship.

After the adoption, Grace informed Wells Fargo that by adopting Daley, she intended him to be her legal heir by adoption and to become the beneficiary of Trust A upon her death. Grace died on November 13, 2006. Daley survived, and Grace left no spouse or biological children. Wells Fargo filed the present trust administration action in the county court for Douglas County seeking a determination of the beneficiaries of Trust A.

Robert Nixon, Kenneth Nixon, Joanne Nixon Rickels, and Dianne Nixon Sullo (the Nixons) are the children of John Jr. John Jr. and his wife were apparently deceased, and therefore, if it were determined that Grace died without children, the Nixons, as beneficiaries of Trust B, would also become the beneficiaries of Trust A. The issue in the trust administration action was whether Daley was a living child of Grace and therefore the beneficiary of Trust A or whether Grace died without children, leaving the Nixons as the beneficiaries.

The county court determined that Daley was the sole beneficiary of Trust A. The court reasoned that Grace's adoption of Daley in California was a lawful adoption pursuant to California law at the time the adoption decree was entered and that full faith and credit should be given to the adoption decree. The court noted that Nixon's will defined "issue" to include "'persons legally adopted'" and that the will did not specify that the term "children" was to exclude adopted children. The court cited *Satterfield v. Bonyhady,* 233 Neb. 513, 446 N.W.2d 214 (1989), in which this court held that in the absence of specific testamentary directions to the contrary, adopted children inherit to the same extent as do natural children. Because the court determined that Daley was Grace's child, it concluded that Daley became the sole beneficiary of Trust A upon Grace's death, and the court ordered Wells Fargo to distribute the assets of Trust A to Daley.

The Nixons appeal the decision of the county court.

ASSIGNMENTS OF ERROR

The Nixons assert that the county court erred in concluding that the State of Nebraska was required to give full faith and credit to the California adoption of Daley. The Nixons also assert that, based on such finding, the county court further erred in finding that Daley was Grace's child and the sole beneficiary of Trust A and in ordering Wells Fargo to deliver the assets of Trust A to Daley.

STANDARDS OF REVIEW

[1] The issue presented in this case is whether the adoption decree entered by the California court is entitled to full faith and credit in Nebraska. This is a question of law. See *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000) (regarding whether paternity decree entered by Oklahoma court entitled to full faith and credit). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

ANALYSIS

The Nixons' arguments focus on the county court's conclusion that it was required to give full faith and credit to the California adoption of Daley. They argue that the adoption was contrary to the public policy of Nebraska and that therefore, it was not entitled to full faith and credit in Nebraska. They also argue that because the court erred in giving full faith and credit to the California adoption, the court further erred by finding that Daley was Grace's child and the sole beneficiary of Trust A and in therefore ordering Wells Fargo to deliver the assets of Trust A to Daley. We conclude that there is no expressed public policy that overcomes the constitutional requirement for Nebraska to give full and faith credit to the judgment of the California court and that therefore, the county court did not err when it determined that Daley was to be considered Grace's child and the sole beneficiary of Trust A and when it ordered Wells Fargo to deliver the assets of Trust A to Daley.

[2,3] The Full Faith and Credit Clause of U.S. Const. art. IV, § 1, provides in part that "Full Faith and Credit shall be

given in each State to the Public Acts, Records, and judicial Proceedings of every other State." We have recognized that adoption decrees are among the judgments to which full faith and credit is due. See *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002). In *Russell v. Bridgens*, a case involving a Pennsylvania adoption decree, we stated that a judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment. Other jurisdictions have similarly recognized adoption decrees as being judgments entitled to full faith and credit. See, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007); *Byrum v. Hebert*, 425 So. 2d 322 (La. App. 1982); *Wachovia Bank and Trust Co. v. Chambless*, 44 N.C. App. 95, 260 S.E.2d 688 (1979); *Delaney v. First National Bank in Albuquerque*, 73 N.M. 192, 386 P.2d 711 (1963).

While we recognized in *Russell v. Bridgens, supra*, that the Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, we noted that a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter. However, the Nixons make no argument in this case that the California court was without jurisdiction over the parties or the subject matter when it issued the adoption decree. Instead, the Nixons argue that the California adoption decree should not be given full faith and credit in Nebraska, because, they assert, the adoption violates Nebraska public policy.

The Nixons argue that the California adoption decree violates Nebraska public policy because the adoption would not have been allowed under Nebraska statutes. They note that Grace could not have adopted Daley in Nebraska, because Nebraska statutes do not, and at the time of the adoption did not, allow the adoption of an adult except under specific circumstances that were not present in this case. The Nixons argue that because the adoption would not have been allowed under Nebraska statutes, the California adoption decree violates Nebraska public policy and should not be given full faith and credit by Nebraska courts.

[4] We note, however, that the U.S. Supreme Court has said that its "decisions support no roving 'public policy exception' to the full faith and credit due *judgments*." *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998) (emphasis in original). In this regard, the Court has differentiated between the application of the Full Faith and Credit Clause as it relates to statutes and as it relates to judgments. The Court has noted that although the Full Faith and Credit Clause does not compel a state to substitute the statutes of another state for its own statutes, with regard to "judgments, however, the full faith and credit obligation is exacting." *Id.* Similarly, in *Miller v. Kingsley*, 194 Neb. 123, 125, 127, 230 N.W.2d 472, 474, 475 (1975), this court stated that a "forum state need not give application to the *statute* of another state where the *statute* is in conflict with the laws or policy of the forum," but that a "state may not refuse to enforce a judgment of a foreign state on the ground that it would result in a violation of the public policy of the forum state." (Emphasis in original.) Therefore, while a Nebraska court would not be required to grant an adoption pursuant to California statutes when such adoption would not be permitted under Nebraska statutes, a Nebraska court may not refuse to recognize the judgment consisting of an adoption decree validly entered by a California court.

The Nixons cite *Hood v. McGehee*, 237 U.S. 611, 35 S. Ct. 718, 59 L. Ed. 1144 (1915), for the proposition that the Full Faith and Credit Clause is not violated when a state excludes children adopted in other states from inheriting property. However, *Hood v. McGehee* does not control the present case. *Hood v. McGehee* involved an Alabama statute which prohibited inheritance by children adopted through proceedings in other states. The U.S. Supreme Court held that the statute did not violate the Full Faith and Credit Clause, because the statute did not fail to give full credit to or "deny the effective operation of the [other state adoption] proceedings." 237 U.S. at 615. Instead, the Alabama statute recognized out-of-state adoptions but, notwithstanding recognition of the adoption, specified that persons adopted in such proceedings were not entitled to the same rights of inheritance as other children

with respect to property in Alabama. Therefore, while a state must give full faith and credit to an adoption decree from another state, *Hood v. McGehee* stands for the proposition that a state may by statute determine the inheritance rights of an individual adopted in another state to property in the forum state.

Unlike the facts at issue in *Hood v. McGehee*, Nebraska has no statute prohibiting persons adopted in other states from inheriting property. Instead, Nebraska probate statutes provide that "an adopted person is the child of an adopting parent," see Neb. Rev. Stat. § 30-2309 (Reissue 2008), and such statutes make no distinction based upon where the adoption proceedings took place. Our case law further indicates that the expressed public policy under Nebraska law is that adopted children are entitled to the same rights of inheritance as biological children. See, *Satterfield v. Bonyhady*, 233 Neb. 513, 446 N.W.2d 214 (1989); *In re Trust Estate of Darling*, 219 Neb. 705, 365 N.W.2d 821 (1985); *Neil v. Masterson*, 187 Neb. 364, 191 N.W.2d 448 (1971); *In re Estate of Taylor*, 136 Neb. 227, 285 N.W. 538 (1939).

The Nixons urge this court to hold as a matter of public policy that an adoption is not valid for purposes of descent if such adoption is a subterfuge done for the purpose of making the adoptee a beneficiary under an existing testamentary instrument. The Nixons cite to cases from other states endorsing such a policy. See *Cross v. Cross*, 177 Ill. App. 3d 588, 532 N.E.2d 486, 126 Ill. Dec. 801 (1988), and cases cited therein. The matter of adoption is statutory, *In re Adoption of Kailynn D.*, 273 Neb. 849, 733 N.W.2d 856 (2007), and as we recently observed, it is the Legislature's function through the enactment of statutes to declare what is the law and public policy. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008). The Nixons argue that the Legislature has expressed the policy it proposes, because Nebraska adoption statutes do not allow the adoption of adults except in certain specific situations not present here. However, we find no clear indication that the public policy behind the Nebraska adoption statutes is to prevent the use of adoption to create inheritance rights. As noted above, the recognized

public policy in Nebraska is that adopted children are entitled to the same inheritance rights as biological children, and we find no indication that this policy is not meant to apply to those validly adopted under the laws of another state. We decline to adopt the holding urged by the Nixons which would deny effect to the California adoption at issue for inheritance purposes in the absence of a clear indication that public policy so requires.

Because we reject the Nixons' assertion that the California adoption decree violated Nebraska public policy and therefore should not be given full faith and credit, we conclude that the county court did not err in concluding that full faith and credit should be given to the California adoption decree. Because of such conclusion, we further conclude that the county court did not err in finding Daley was Grace's child. As the county court noted, Nixon's will defined "issue" to include "'persons legally adopted'" and the will did not specify that the term "children" was to exclude adopted children. Because the county court did not err in finding Daley to be Grace's child, it further did not err in finding Daley to be the sole beneficiary of Trust A and in therefore ordering Wells Fargo to deliver the assets of the trust to Daley.

CONCLUSION

We conclude that the county court did not err in concluding that the California adoption decree was entitled to full faith and credit in Nebraska. We therefore further conclude that the county court did not err in finding Daley to be Grace's child and the sole beneficiary of Trust A and in therefore ordering Wells Fargo to deliver the assets of Trust A to Daley.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

TREVOR WALSH, APPELLEE, V. CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM AND THE CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANTS.

763 N.W.2d 411

Filed April 10, 2009. No. S-08-184.

1. **Ordinances: Statutes: Appeal and Error.** When analyzing a municipal ordinance, an appellate court follows the same rules as those applied to statutory analysis.
2. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. ____: ____. Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Jo A. Cavel, Deputy Omaha City Attorney, for appellants.

Thomas F. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

After he was terminated from his employment with the Omaha Police Department, Trevor Walsh filed an application for a non-service-connected disability (NSCD) pension from the City of Omaha Police and Fire Retirement System (Retirement System). The Retirement System's board of trustees (Board) denied Walsh's request because he was not a member of the Retirement System at the time he filed the application.

Walsh filed a complaint pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164

(Reissue 2008), in the Douglas County District Court. The court held that the Omaha Municipal Code did not require an applicant for an NSCD pension to be a member of the Retirement System at the time of application. The court sustained Walsh's motion for summary judgment and ordered the Board to hear Walsh's application. The Retirement System and the City of Omaha (City) appeal.

SCOPE OF REVIEW

[1,2] When analyzing a municipal ordinance, an appellate court follows the same rules as those applied to statutory analysis. *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Id*. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id*.

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

FACTS

On February 7, 2000, Walsh injured his back and right knee in an accident while employed as a police officer for the City. Walsh filed a request with the Retirement System for a service-connected disability pension based on the injuries. The Board denied the request, and Walsh sought review in the Douglas County District Court. While the matter was pending in the district court, Walsh asked the Board to reconsider its decision. He attached a copy of the municipal ordinance that had not previously been presented before the Board. The Board denied the request to reconsider, and the district court affirmed the Board's decision to deny Walsh's application.

On appeal, the Nebraska Court of Appeals found that there was sufficient relevant evidence to support the Board's decision that Walsh's injuries did not make him permanently unable to perform his duties as a police officer. *Walsh v. City of Omaha Police & Fire Ret. Sys.*, No. A-04-090, 2005 WL 1216232 (Neb. App. May 10, 2005) (not designated for permanent

publication). The Court of Appeals affirmed the Board's denial of Walsh's application for a pension. *Id*.

On July 1, 2003, while the district court proceedings were pending, Walsh was terminated from his employment. Approximately 3 years later, Walsh filed an application for an NSCD pension with the Retirement System, claiming entitlement under Omaha Mun. Code, ch. 22, art. III, § 22-79 (2002). The Board denied the request because Walsh was not a member of the Retirement System at the time of his request or as of the date of the Board's hearing. The Board concluded, therefore, that Walsh was not qualified to make such an application.

Walsh filed a declaratory judgment action asking the court to construe § 22-79. Both parties moved for summary judgment. The district court held that interpreting the municipal code to require an applicant for an NSCD pension to be currently employed at the time of the application, as opposed to the time the applicant sustained the disabling injuries, would cause an absurd result. The court sustained Walsh's motion for summary judgment and overruled the motion filed by the Retirement System and the City. The court ordered the Board to hear Walsh's application for an NSCD pension. The Retirement System and the City appeal.

ASSIGNMENTS OF ERROR

In summary, the Retirement System and the City argue that the district court erred in sustaining Walsh's motion for summary judgment and in construing § 22-79 to permit application for an NSCD pension by Walsh, who was not a member of the Retirement System at the time his application was filed.

ANALYSIS

The issue is whether Walsh was eligible to apply for an NSCD pension from the Retirement System after his employment with the Omaha Police Department had been terminated and he was no longer a member of the system.

Section 22-79 provides:

> (a) Any member of the system who, while not in the line of duty, has sustained or shall sustain injuries or

> sickness, not arising out of the immediate or direct performance or discharge of duty, which immediately or after a lapse of time permanently unfit such annuitant for active duty in such annuitant's department, shall receive a monthly ordinary disability pension as long as such annuitant remains unfit for active duty in such annuitant's department . . . .
>
> . . . .
>
> (b) Any member of the system seeking benefits under this section shall not be entitled to any benefit provided herein if such annuitant's disability from injuries or illness arises from or is a result of any act committed by such member, which act is a violation of any state or federal criminal statute or any city criminal ordinance.

"Members" are defined as "[p]ermanent currently employed probationary and regular uniformed personnel actually engaged in or normally available for assigned duties, including those in official leave status. . . ." Omaha Mun. Code, ch. 22, art. III, § 22-63 (2004). In addition, Omaha Mun. Code, ch. 22, art. III, § 22-64 (2001), states: "Membership in the . . . [R]etirement [S]ystem shall be limited to and shall include only current permanent, probationary and regular uniformed personnel of the police and fire departments of the [C]ity."

The parties disagree whether the Omaha Municipal Code requires that a person be a member of the Retirement System at the time he or she files an application for an NSCD pension or whether the code requires only that the individual was a member of the Retirement System at the time of the injury that led to the disability.

The district court stated: "Requiring an applicant for [an NSCD] pension to be currently employed at the time of the application, as opposed to when he sustained the disabling injuries, is seriously flawed not only in the construction of the language but by causing an absurd result." The court noted that the plain, direct, and unambiguous meaning of the phrase found in § 22-79, "[a]ny member of the system who . . . has sustained or shall sustain injuries or sickness," applies to a person who is a member of the Retirement System and sustains an injury. The court stated: "It does not directly or indirectly imply that

you have to be a member of the [Retirement] System when you apply for a pension based on injuries sustained while you were a member of the system. The Retirement System's interpretation causes absurd, unfair, and inequitable results."

The district court determined:

> It is . . . the time of the injury which gives rise to the pension entitlement that is relevant, not the time when the application is made. If the time of application were important or relevant, the ordinance would have in a straightforward fashion, using clear language, state[d] that an individual must be a member of the system at the time of applying for [an NSCD] pension. That however is not what the ordinance states.

When analyzing a municipal ordinance, an appellate court follows the same rules as those applied to statutory analysis. *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004). See, also, *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001). We first look to the plain language of the code. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Prater, supra*. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

Section 22-79 provides for a monthly disability pension for any member of the Retirement System who sustains injuries or sickness while not in the line of duty or arising out of the performance of duty if the injuries or sickness immediately or after a lapse of time make the member permanently unfit for active duty. It was not disputed that Walsh suffered injuries to his back and right knee while he was a member of the Retirement System. He was denied a service-connected disability while employed by the City.

After his employment was terminated, Walsh sought an NSCD pension. The definition of a "member" includes those permanent, currently employed uniformed personnel. He was employed and a member of the Retirement System at the time

he sustained the injuries for which he seeks a disability pension. As the district court stated, the plain, direct, and unambiguous meaning of § 22-79, provides that it is "the time of the injury which gives rise to the pension entitlement . . . not the time when the application is made."

This court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. The ordinance does not state that a disability pension is available only to an employee who is a member of the Retirement System at the time he or she applies for a pension.

In addition, § 22-79 provides for eligibility for a disability from injuries or sickness which immediately or *after a lapse of time* leaves the annuitant unfit for active duty. The ordinance states that a disability pension may be granted to a member who sustains injuries which do not affect his or her performance immediately, but arise after a period of time. The plain reading of this portion of the ordinance also supports a finding that it is the time of the injury or sickness which is relevant to a member's eligibility for a disability pension.

[4] The district court sustained Walsh's motion for summary judgment and directed the Board to hear his application for an NSCD pension. Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). The court was correct in sustaining Walsh's motion and in ordering that Walsh should have his application heard by the Board.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., participating on briefs.

LOREN W. KOCH, APPELLEE, V. RONALD E. AUPPERLE AND MARY ANN AUPPERLE, APPELLANTS, AND LOWER PLATTE SOUTH NATURAL RESOURCES DISTRICT, INTERVENOR-APPELLEE.

763 N.W.2d 415

Filed April 10, 2009. No. S-08-245.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Injunction: Damages.** When damages result from a wrongfully granted injunction, the person who requested the injunction ought to pay all resultant damages.
4. **Injunction: Damages: Attorney Fees.** All reasonable damages may be recovered by an enjoined party if the injunction was granted in error. Reasonable attorney fees incurred in dissolving the bond may also be recovered.
5. **Injunction: Bonds: Damages: Attorney Fees.** Pursuant to Neb. Rev. Stat. §§ 25-1067 and 25-1079 (Reissue 2008), if an injunction is wrongfully granted, the party requesting the injunction is required to pay all damages and reasonable attorney fees to the enjoined party and is not limited to the amount of the bond.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed and remanded for further proceedings.

Thomas E. Jeffers and Mathew T. Watson, of Crosby Guenzel, L.L.P., for appellants.

Stephen D. Mossman, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Ronald E. Aupperle and Mary Ann Aupperle appeal the decision of the Cass County District Court limiting their damages to the amount of the supersedeas bond that Loren W. Koch had filed with the court when he sought an injunction against

the Aupperles. The district court originally granted Koch's request for an injunction to prevent the Aupperles from constructing a small dam and pond across an unnamed tributary of Weeping Water Creek. This court reversed that decision and remanded the cause "with directions to vacate the injunction, dismiss Koch's verified complaint, and determine whether the Aupperles and [the Lower Platte South Natural Resources District] are entitled to recover damages or attorney fees as a result of the injunction issued below."[1]

The sole issue presented at this time is whether the Aupperles are entitled to more than the amount of the supersedeas bond. We reverse the decision of the district court and remand the cause for proceedings consistent with this opinion.

FACTS

The pertinent facts are contained in our prior opinion regarding this cause and need not be revisited in their entirety here. In short, however, the Aupperles had planned to build a dam across an unnamed tributary of Weeping Water Creek to create a small pond on their property, with the cooperation of the Lower Platte South Natural Resources District (LPSNRD). Koch, a downstream user of the waters from the tributary, sought and obtained an injunction to enjoin the construction and requested that the Aupperles be required to include a device that would allow water to pass through the dam.

Koch was required to post a bond under Neb. Rev. Stat. § 25-1067 (Reissue 2008). The district court set the bond at $1,000. The Aupperles subsequently moved to increase that amount under Neb. Rev. Stat. § 25-1073 (Reissue 2008). On July 25, 2005, during the hearing on the motion to increase the bond, the Aupperles argued that their building costs had gone up due to the delay. Koch argued that there was insufficient evidence to increase the bond. Koch and the district court both acknowledged that there were two exhibits already in the record, and the Aupperles did not introduce any additional evidence. The district court stated that it would consider

[1] *Koch v. Aupperle*, 274 Neb. 52, 70, 737 N.W.2d 869, 882 (2007).

the request based on the evidence before it, and it denied the request the next day.

Upon the Aupperles' original appeal, this court held that Koch was not entitled to injunctive relief and reversed the judgment of the district court. The cause was remanded to determine whether the Aupperles and LPSNRD were entitled to damages or attorney fees. The district court cited *Tracy v. Capozzi*,[2] a Nevada case, in determining that the Aupperles could not recover more than $1,000, the amount of the original bond, unless they could show that Koch acted in bad faith. After finding that Koch had not acted maliciously or in bad faith in requesting the injunction, the district court limited recovery to the amount of the bond.

In its order, the district court stated that the Aupperles had clearly shown attorney fees and damages not less than $1,000. The district court then awarded costs to the Aupperles and LPSNRD, to be paid by Koch out of the bond. The Aupperles brought this appeal, contending that they were due the full amount of their damages and attorney fees under Neb. Rev. Stat. § 25-1079 (Reissue 2008). LPSNRD did not appeal from the district court's decision.

ASSIGNMENT OF ERROR

The Aupperles assign that the district court erred when it determined that their recovery of damages and attorney fees was limited to the amount of the supersedeas bond deposited with the court.

STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[3]

[2] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an

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[2] *Tracy v. Capozzi*, 98 Nev. 120, 642 P.2d 591 (1982).

[3] *Koch, supra* note 1.

independent, correct conclusion irrespective of the determination made by the court below.[4]

ANALYSIS

At issue in this case is whether an enjoined party may recover more than the amount of the supersedeas bond should an injunction later be dissolved. Section 25-1067 states that a party cannot obtain an injunction unless the requesting party gives sufficient sureties "to secure to the party enjoined the damages he may sustain, if it be finally decided that the injunction ought not to be granted." Section 25-1079 provides for payment of damages out of the supersedeas bond, stating as follows:

> Such supersedeas bond shall be executed on or before twenty days from the time of the order dissolving or modifying such injunction, shall be signed by one or more sufficient sureties to be approved by the clerk of the court, and shall be conditioned that the party or parties who obtained such injunction shall pay to the defendant, or defendants, all damages, which he or they shall sustain by reason of said injunction, if it be finally decided that such injunction ought not to have been granted.

This court has not yet addressed whether a party may recover more than the amount of the supersedeas bond.

In its order, the district court noted that a majority of states limit recovery to the amount of a bond, if the temporary injunction is wrongfully granted.[5] *Tracy*, cited by the district court, outlines the reasoning of the majority:

> [W]e find the majority view more compatible with public policy encouraging ready access to our courts. On balance, we find this public policy principle outweighs our concern for defendants facing inadequate bonds at the termination of a wrongful restraint. We must zealously protect the good faith pursuit of legal and equitable remedies

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[4] *Robertson v. School Dist. No. 17*, 252 Neb. 103, 560 N.W.2d 469 (1997).

[5] See, 42 Am. Jur. 2d *Injunctions* § 357 (2000); Annot., 30 A.L.R.4th 273 (1984).

> from the deterrent certain to be posed by unknown liability for mistake.[6]

Thus, the majority view holds that ready access to the courts outweighs concern for the damages a wrongfully enjoined party may sustain. The *Tracy* court also points out that an enjoined party who feels that the bond is inadequate may move the court for an increase, something that is true under our statutes as well.[7]

[3] Conversely, the minority view holds that when damages result from a wrongfully granted injunction, the person who requested the injunction ought to pay all resultant damages.[8] This view has a commonsense appeal, as noted by the court in *Tracy*, because it places responsibility for damages on the party causing them, and it places the risk on the party requesting the injunction.[9]

[4] The Aupperles urge us to adopt the minority view, contending that § 25-1079 requires that Koch pay "all damages" sustained from the grant of the injunction, an issue that the district court did not address. The Aupperles point out that other states have required those who obtained a wrongful injunction to pay all damages when there is a statute that conditions an injunction with payment of all damages.[10] While we note that there are states which have statutory language mirroring ours that side with the majority,[11] we find the reasoning of the minority of states more persuasive when paired with our own statutes. Indeed, we find our statutory language compels us to join the minority of states, as § 25-1079 clearly states that the party who "obtained such injunction shall pay . . . all damages, which he or they shall sustain by reason of said injunction." We therefore find that all reasonable damages may be recovered

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[6] *Tracy, supra* note 2, 98 Nev. at 125, 642 P.2d at 595.

[7] See, § 25-1073; *Tracy, supra* note 2.

[8] See *Tracy, supra* note 2.

[9] See *id.*

[10] *Corpus Christi Gas Co. v. City of Corpus Christi*, 46 F.2d 962 (5th Cir. 1931); *Houghton et al. v. Grimes et al.*, 100 Vt. 99, 151 A. 642 (1930).

[11] See, *Petrol Properties v. Stewart Title Co.*, 225 S.W.3d 448 (Mo. App. 2007); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990).

by an enjoined party if the injunction was granted in error. Reasonable attorney fees incurred in dissolving the bond may also be recovered.[12]

We note that the Aupperles exhausted their statutory remedies by moving for an increase in the bond. Section 25-1073 allows a restrained party to move the court for additional security, "and if it appears that the surety in the undertaking has removed from the state or is insufficient," the court can either vacate the injunction or order an increase in the bond. In this case, the Aupperles requested an increase in the amount of the bond, and it was denied.[13] We find that equity, as well as our statutory language and policies, requires a party requesting an injunction to pay for any damages caused by the injunction, as well as reasonable attorney fees.

CONCLUSION

[5] Pursuant to §§ 25-1067 and 25-1079, if an injunction is wrongfully granted, the party requesting the injunction is required to pay all damages and reasonable attorney fees to the enjoined party and is not limited to the amount of the bond. We reverse the decision of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[12] *Williams v. Hallgren*, 149 Neb. 621, 31 N.W.2d 737 (1948).

[13] See, e.g., *Tracy, supra* note 2.

IN RE INTEREST OF C.H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. C.H., APPELLANT.

763 N.W.2d 708

Filed April 10, 2009. No. S-08-261.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Motions to Suppress: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress statements to determine whether an individual was "in

custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave is reviewed de novo.

3. **Miranda Rights: Words and Phrases.** An individual is in custody during an interrogation if there is a restraint on freedom of movement of the degree associated with a formal arrest.
4. **Miranda Rights.** There are two inquiries relevant to determining the degree of restraint on freedom of movement: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.
5. **Juvenile Courts: Miranda Rights.** In situations where authorities initiate contact with a juvenile, an advisement to the juvenile that he has the option to stay and answer questions or terminate the interview is crucial to the determination of whether a statement by the juvenile was voluntary.
6. **Evidence: New Trial: Appeal and Error.** When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission.

Appeal from the County Court for Madison County: ROSS A. STOFFER, Judge. Reversed and remanded with directions.

Matthew A. Headley, Deputy Madison County Public Defender, and Melissa A. Wentling for appellant.

Gail Collins, Deputy Madison County Attorney, for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

C.H., a minor, appeals his adjudication in the separate juvenile court of Madison County. The court found C.H. to be a juvenile within the meaning of Neb. Rev. Stat. § 43-247(1) and (2) (Cum. Supp. 2006) based on evidence that C.H. sexually assaulted his 5-year-old half sister. Because the court should have suppressed C.H.'s confession, we reverse the adjudication and remand the cause for a new adjudication hearing.

SCOPE OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008).

[2] In reviewing a motion to suppress statements to determine whether an individual was "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), findings of fact as to the circumstances surrounding the interrogation are reviewed for clear error, and the determination whether a reasonable person would have felt that he or she was or was not at liberty to terminate the interrogation and leave is reviewed de novo. *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

FACTS

C.H. was 14 years old in October 2007. At that time, he lived with his father, stepmother, and three half siblings. He shared a bedroom with his two half brothers and half sister, ages 8, 4, and 5, respectively. C.H. had his own bed, his half brothers shared the top bunk of a bunk bed, and his half sister, the victim, slept in the bottom bunk.

During the night of October 15, 2007, C.H.'s father heard the girl whimpering in the children's bedroom. When he entered the room, he saw C.H. leaning over her while she slept. C.H. told his father that C.H. thought she had wet the bed. Two days later, on October 17, the girl told their father that C.H. had put tape over her mouth the night before and that her "potty hurt." In response to this statement, the father called the principal at the high school where C.H. was a student and the Madison County Sheriff's Department.

Investigator Richard Drummond with the Madison County Sheriff's Department received the father's call about the allegations. Drummond arranged for the child advocacy center at a hospital in Norfolk, Nebraska, to interview the girl. He also asked Traci Fox, a protection and safety worker with the Department of Health and Human Services, to assist with the investigation.

At the child advocacy center, forensic investigator Kelli Lowe interviewed the girl. The statement given indicated that C.H. put blue tape on her mouth, that he put his hand in her genitalia, that she told C.H. not to do that, and that she did not like it. She also told Lowe that C.H. touched her vagina with his penis.

Lowe showed the girl drawings of a little girl without her clothes on and a little boy without his clothes on and asked her to identify body parts. The girl identified the genitalia of the girl in the picture and the genitalia of the boy in the picture.

After the interview, a physician's assistant employed by the hospital physically examined the girl. At the beginning of the examination, the girl indicated to the physician's assistant that C.H. had touched her in the vaginal area and the anal area with his finger and that he tried to place his penis inside her. During the examination, the girl described other incidents of sexual assault by C.H.

Following the interview and examination, Drummond and Fox went to the school C.H. attended and met with the principal. Drummond spoke to the father about interviewing C.H., and the father did not object to the interview. C.H.'s father and stepmother also expressed that they were not willing to allow C.H. to return to their home following the interview. Before meeting with C.H., Drummond determined that he would detain C.H. and take him to the juvenile detention center in Madison, Nebraska, at the conclusion of the interview.

At the school, the principal brought C.H. to a conference room in the principal's office area. Drummond and Fox entered the room after C.H. The room was a large, well-lit room with tables set up in a U-shape and chairs around the outside of the tables. There was one window to the outside, and the door to the room was on the wall opposite the window. C.H. sat in a chair against the wall near the door between the ends of the U-shaped tables. Drummond sat on one side of the "U," and Fox sat on the other. Drummond was dressed in plain clothes and sat 4 to 5 feet from C.H. The door to the room was unlocked.

Drummond introduced himself and Fox and told C.H. that he was with the Madison County Sheriff's Department. He

told C.H. they were going to ask him some questions. The entire interview lasted approximately 30 minutes. The first 10 to 15 minutes consisted of discussing C.H.'s background and family information. Drummond did not tell C.H. that he was free to leave at any time during the interview or that he could terminate the interrogation, nor did he advise C.H. of his *Miranda* rights.

Drummond conducted the interview in a conversational question-and-answer format, and C.H. answered the questions. Drummond stated that C.H. did not appear tired or under the influence of any medication. He appeared to understand what was going on and did not appear to have any mental problems, to be developmentally delayed, or to have any physical problems indicating discomfort or duress.

After gathering background information, Drummond asked questions about the sexual allegations. Drummond described the conversation as follows:

> I told [C.H.] that his sister . . . had spoken to her dad that morning and said that . . . there had been some inappropriate sexual contact and that [she] had gone to the hospital where we had been most of the morning and up until the time that we came and talked to him. That [she] had been interviewed and also had been — and checked physically. And he at that point he began to show some emotion, started . . . weeping a little bit, asked if [she] was okay. Then I asked him if . . . he had had inappropriate contact with her.

C.H. admitted to sexual contact with the girl. C.H. told Drummond the sexual encounters happened quite often.

At the conclusion of the interview, Drummond informed C.H. that he was going to be detained and taken to the juvenile detention center. Drummond transported C.H. to the juvenile detention center in his unmarked police vehicle. C.H. was not restrained and rode in the front passenger seat. Fox rode in the back seat behind C.H.

After C.H. was removed from the family home, his stepmother found blue tape under C.H.'s bed. While C.H.'s father and stepmother were transporting him to an appointment in October 2007, he told them that he "'was guilty.'" When his

father asked him if what he told Drummond was true, C.H. started crying and said he was sorry.

On November 13, 2007, C.H. filed a motion to suppress the statements he made to Drummond and Fox. On December 4, the juvenile court held a hearing on the motion. On January 7, 2008, the court overruled C.H.'s motion to suppress.

A trial was held on February 19, 2008, and the parties stipulated to the facts of the case, except that C.H. objected to consideration of his statements to Drummond and Fox. The juvenile court found that C.H. had committed acts which would constitute the felony offense of sexual assault in the first degree and that C.H. had committed acts which would constitute the misdemeanor offense of sexual assault in the third degree. The court adjudged C.H. to be a juvenile within § 43-247(1) and (2) and committed him to the temporary custody of the Department of Health and Human Services, Office of Juvenile Services (OJS), for an evaluation. On March 11, C.H. filed an appeal of his adjudication. On April 7, the court placed C.H. in the temporary legal custody of OJS and in the physical custody of a sex offender treatment group home in South Sioux City, Nebraska.

ASSIGNMENTS OF ERROR

C.H. assigns, restated, that the juvenile court erred in (1) overruling his motion to suppress; (2) finding that the State proved beyond a reasonable doubt that C.H. committed acts which would constitute a felony and a misdemeanor, causing him to be a juvenile within the meaning of § 43-247(1) and (2); and (3) placing C.H. at a juvenile detention center during the pendency of the case.

ANALYSIS

Motion to Suppress

C.H. first alleges that the juvenile court erred when it denied his motion to suppress statements he made to Drummond, a law enforcement officer, during the interview at his school. He argues that the court should have suppressed his statements on the grounds that he made the statements during a custodial

interrogation and had not been advised of his *Miranda* rights, thereby violating his Fifth Amendment rights.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the U.S. Supreme Court held that authorities must employ procedural safeguards during a custodial interrogation to protect a suspect's privilege against self-incrimination. Specifically, authorities must advise an individual in custody that he has the right to remain silent and the right to an attorney. However, this requirement applies only "'where there has been such a restriction on a person's freedom as to render him [or her] "in custody."'" *In re Interest of Tyler F.*, 276 Neb. 527, 532, 755 N.W.2d 360, 366 (2008) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977)). When a suspect is not in custody, authorities are not required to advise the suspect of his or her rights and may use the statements at trial.

The term "interrogation" encompasses express questioning as well as words or actions by police officers, other than those routine to arrest and custody, that the officers should know are reasonably likely to elicit an incriminating response from the suspect. See *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007). In this case, Drummond's interview of C.H. at the school was clearly an interrogation, and it is undisputed that Drummond did not advise C.H. of his *Miranda* rights. Therefore, the issue presented is whether C.H. was in custody during the interrogation. If C.H. was in custody, the juvenile court erred in failing to suppress the statements he made to Drummond.

[3,4] An individual is in custody during an interrogation if there is a "'"restraint on freedom of movement" of the degree associated with a formal arrest.'" *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995). Accord *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004). There are two inquiries relevant to determining the degree of restraint on freedom of movement: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.

Id. See, also, *State v. Rogers*, *ante* p. 37, 760 N.W.2d 35 (2009); *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

In *State v. Rogers*, *supra*, we described many circumstances that the court may assess in determining whether an individual is "in custody." We described eight circumstances that are considered to be most relevant to the custody inquiry. We also cited *State v. Mata*, *supra*, in which we found helpful the assessment of six common indicia outlined by the U.S. Court of Appeals for the Eighth Circuit in *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002). Those factors are:

> "(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to [leave], or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong[-]arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6), whether the suspect was placed under arrest at the termination of the questioning."

Id. at 500. See, also, *In re Interest of Tyler F.*, *supra*; *State v. McKinney*, *supra*; *State v. Mata*, *supra*. The first three factors are mitigating factors. The presence of these circumstances indicates a suspect was not in custody. The second three factors are aggravating factors, the existence of which make it more likely a suspect was in custody. We recently applied these factors in a juvenile custody inquiry in *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

In *In re Interest of Tyler F.*, a 14-year-old juvenile was adjudicated in juvenile court on allegations of criminal impersonation and disturbing the peace. The charges stemmed from allegations that Tyler F. accessed the Internet and posed as a female acquaintance. He posted a classified advertisement on a Web site, stating that the female was looking to have sexual relations with men. Several men used the contact information

provided in the advertisement to call the female or show up at her home. The police ultimately identified Tyler as a suspect and interviewed him at his high school about the Internet post. During the interrogation, Tyler admitted that he had posted the classified advertisement. At trial, he sought to suppress the statements he made to officers, because he was not given *Miranda* warnings before the interrogation. The juvenile court denied the motion.

On appeal, we analyzed the mitigating and aggravating factors set forth in *U.S. v. Axsom, supra*, to determine whether Tyler was in custody. The interviewing officers informed Tyler that he was not under arrest. He had unrestrained freedom of movement during the interrogation. He was not handcuffed or physically restrained, and officers did not physically block or prevent his movement. It was less clear whether he "initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions." *In re Interest of Tyler F.*, 276 Neb. at 535, 755 N.W.2d at 368. Although Tyler did not initiate the interview and was escorted to the interview by school security guards, this did not automatically indicate that his responses were not voluntary. In fact, Tyler agreed to talk to the officers after they informed him that he was free to leave. Therefore, all mitigating circumstances indicated that Tyler was not in custody.

Consideration of the aggravating factors also indicated that Tyler was not in custody. Regarding the first aggravating factor, we noted that the officers did not use any strong-arm tactics or deceptive stratagems. They were dressed in plain clothes and did not have firearms drawn. The officers were straightforward with the evidence, and Tyler confessed when the officers informed him they had traced the Internet post to his family computer. Tyler was not placed under arrest at the termination of questioning. Following his confession, Tyler was permitted to return to class.

The evidence supported all three mitigating factors and did not support two of the three aggravating factors. We declined to definitively resolve the question of whether the interrogation atmosphere was police dominated. Weighing the factors, we concluded that the juvenile was not in custody and that use of

his statements did not violate his Fifth Amendment rights. *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008). We reached the same conclusion in *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007), and *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

In the case at bar, the factors indicate that C.H. was in custody. Although C.H. had unrestrained freedom of movement during the questioning, Drummond did not advise C.H. that he was not under arrest, that he was free to leave, or that he did not have to talk to Drummond and Fox or answer any questions. Based on our analysis in *In re Interest of Tyler F.* and because C.H. was not told that he was free to leave and did not have to answer questions, we conclude that C.H. did not voluntarily acquiesce to questioning by law enforcement or social services.

[5] As in *In re Interest of Tyler F.*, C.H. was escorted to the principal's office for the interview, and there is no evidence that he resisted talking to Drummond. However, unlike the juvenile in *In re Interest of Tyler F.*, C.H. did not confess with the assurance and knowledge that he was free to terminate the interview and leave. In situations where authorities initiate contact with a juvenile, an advisement to the juvenile that he has the option to stay and answer questions or terminate the interview is crucial to the determination of whether a statement by the juvenile was voluntary. See *In re Interest of Tyler F.*, *supra*. Because C.H. was not advised that he was free to leave, we conclude that his statements were not voluntary.

We also find that the third aggravating circumstance was present. Following the interrogation, Drummond placed C.H. in custody and transported him to the juvenile detention center. Even before the interrogation, Drummond had made the determination to place C.H. in custody regardless of whether he confessed.

Assessing the circumstances surrounding the interrogation, we conclude that three factors indicate C.H. was in custody. C.H. was not advised that he was free to leave, his statements to Drummond were not made voluntarily, and he was placed in custody at the conclusion of the interrogation. A law enforcement officer's preinterview decision to take a suspect

into custody at the conclusion of questioning is not necessarily fatal to the custody analysis, but the decision to place C.H. in custody following the interrogation prevented Drummond from being able to honestly tell C.H. that he was free to leave. Without this advisement, C.H. did not have the information necessary to make an informed decision as to whether to talk to law enforcement and social services.

C.H. was a 14-year-old high school freshman summoned to the principal's office and questioned by an officer from the sheriff's department regarding serious allegations of sexual assault. He was not told that he was free to leave, and we conclude that someone in C.H.'s position would not believe he was at liberty to terminate the interrogation and leave. C.H. was "in custody" for purposes of *Miranda* protections. Since he was not advised of his *Miranda* rights, the juvenile court erred in failing to suppress his confession.

Sufficiency of Evidence

[6] When considering the sufficiency of the evidence in determining whether to remand for a new trial or to dismiss, an appellate court must consider all the evidence presented by the State and admitted by the trial court irrespective of the correctness of that admission. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005); *State v. Rathjen*, 266 Neb. 62, 662 N.W.2d 591 (2003). In the case at bar, the evidence presented by the State and admitted by the juvenile court established beyond a reasonable doubt that C.H. committed acts which would constitute a misdemeanor and a felony, causing him to be a juvenile within § 43-247(1) and (2). Specifically, the evidence shows that C.H. committed acts which would constitute third degree sexual assault, a misdemeanor, and first degree sexual assault, a felony.

Third degree sexual assault occurs when a person subjects another person to sexual contact without the consent of the victim or when the person knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct. Neb. Rev. Stat. § 28-320 (Reissue 2008). Pursuant to § 28-320, a sexual assault is third degree sexual assault and

is a Class I misdemeanor if the actor does not cause serious personal injury to the victim.

First degree sexual assault occurs when a person subjects another person to sexual penetration without the consent of the victim or when the person knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct. Neb. Rev. Stat. § 28-319 (Reissue 2008). Pursuant to § 28-319, first degree sexual assault is a Class II felony.

Considering all of the evidence regardless of whether it was properly admitted, there was sufficient evidence for the juvenile court to find beyond a reasonable doubt that C.H. committed these acts and was a juvenile within § 43-247(1) and (2). Because the confession should have been suppressed and was a significant part of the evidence upon which the court relied, we cannot say that admission of the confession was harmless. We therefore reverse the adjudication and remand the cause for a new adjudication hearing in which the confession is excluded.

Detention During Pendency of Case

C.H.'s final assignment of error, that the juvenile court abused its discretion by placing him at the juvenile detention center during the pendency of the case, is moot. C.H. was placed at the juvenile detention center on October 17, 2007, following his interview with Drummond. He remained at the center until the court placed C.H. in the temporary custody of OJS on April 7, 2008, for placement in a sex offender treatment group home. It was determined that this placement would be in C.H.'s best interests. C.H. is no longer at the juvenile detention center; therefore, we do not need to further address this issue. See *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

Because we reverse the adjudication and remand the cause, we note that detention pending adjudication is permitted by Neb. Rev. Stat. § 43-254 (Reissue 2008). Section 43-254 states that "pending the adjudication of any case, if it appears that the need for placement or further detention exists, the juvenile may

be . . . (2) kept in some suitable place provided by the city or county authorities."

CONCLUSION

The juvenile court erred in denying C.H.'s motion to suppress his confession. Because the confession was erroneously considered by the court, we reverse the court's adjudication that C.H. was a juvenile within § 43-247(1) and (2) and we remand the cause for a new adjudication hearing.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., participating on briefs.

HEAVICAN, C.J., not participating.

IN RE INTEREST OF O.S., ALLEGED TO BE A DANGEROUS SEX OFFENDER. O.S., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

763 N.W.2d 723

Filed April 10, 2009. No. S-08-405.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.
2. **Judgments: Appeal and Error.** In reviewing a district court's judgment, an appellate court will affirm the judgment unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
3. **Convicted Sex Offender: Due Process: Proof.** Although the Sex Offender Commitment Act does not statutorily require a showing of a recent act of violence, it satisfies due process by requiring the State to prove that a substantial likelihood exists that an individual will engage in dangerous behavior unless restraints are applied.
4. **Convicted Sex Offender: Proof.** To prove that an individual is a dangerous sex offender under the Sex Offender Commitment Act, the State must prove by clear and convincing evidence that the individual is likely to engage in repeat acts of sexual violence and that the individual is substantially unable to control his criminal behavior.
5. **Convicted Sex Offender: Mental Health: Evidence.** Civil commitments under the Sex Offender Commitment Act and the Nebraska Mental Health Commitment Act require that the mentally ill person be dangerous and that absent confinement, the person is likely to engage in particular acts which will result in substantial harm to himself or others.

6. **Criminal Law: Mental Health.** In determining whether a person is dangerous, the focus must be on the person's condition at the time of the hearing.
7. **Mental Health: Other Acts: Proof.** Actions and statements of a person alleged to be mentally ill and dangerous which occur before the hearing are probative of the subject's present mental condition. But, for a past act to have evidentiary value, the past act must have some foundation for a prediction of future dangerousness, thus being probative of that issue.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Sean M. Conway for appellant.

Michael W. Jensen, Deputy Douglas County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

O.S. challenges the constitutionality of the Sex Offender Commitment Act (SOCA).[1] He claims that SOCA violates equal protection, double jeopardy, and an impermissible ex post facto law under the U.S. Constitution and the Nebraska Constitution. O.S. also challenges the sufficiency of the evidence supporting the order of the Mental Health Board of the Fourth Judicial District (the Board) that he is a dangerous sex offender in need of involuntary, inpatient treatment.

We recently decided in *In re Interest of J.R.*[2] that SOCA does not violate equal protection or double jeopardy and is not an impermissible ex post facto law. Thus, O.S.' constitutional challenge fails. We also conclude that the State presented sufficient evidence to support a finding that O.S. was a dangerous sex offender. But, we also conclude the State failed to show by clear and convincing evidence that involuntary, inpatient treatment was the least restrictive treatment alternative. We affirm

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[1] Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Cum. Supp. 2008).

[2] *In re Interest of J.R.*, *ante* p. 362, 762 N.W.2d 305 (2009).

in part, and in part reverse and remand to the district court with directions.

In 1986, O.S. pleaded no contest to charges of first degree sexual assault, use of a weapon to commit a felony, and false imprisonment. The district court later sentenced him to 15 to 30 years in prison for first degree sexual assault, 5 to 10 years in prison for use of a weapon to commit a felony, and 1½ to 5 years in prison for first degree false imprisonment. O.S.' discharge date from prison was June 14, 2007.

Because the State believed O.S. to be a dangerous sex offender, he was subject to a psychological evaluation for that determination.[3] Kirk A.B. Newring, Ph.D., a psychologist for the Department of Correctional Services, did the psychological evaluation. At a hearing on June 12, 2007, the Board heard Newring's testimony regarding his evaluation.

As part of the evaluation, Newring reviewed O.S.' records from the Department of Correctional Services (hereinafter Corrections), including police reports from the sexual assault that led to his conviction, misconduct reports while incarcerated, and his mental health records. Newring also conducted a clinical interview. With this information, Newring assessed O.S.' level of risk for sexual reoffense using three tools: a "Static-99" measure, the "Psychopathy Checklist: Revised" (PCL:R), and the "Sex Offender Risk Appraisal Guide" (SORAG). Newring testified that all three are generally accepted in the field of psychology but stated that some in the field do not recommend the use of actuarial instruments.

Newring's testimony included only a brief explanation of each instrument, along with O.S.' scores based solely on Newring's own analysis. The Static-99 is an instrument designed to estimate sexual and violent recidivism risk among sex offenders; it uses risk factors associated with sexual recidivism. O.S. scored a five, placing him in the medium- to high-risk category for committing a future sexual offense compared with other adult male sex offenders. Newring testified that of the individuals within the reference group who also had a score of five, 33 percent sexually reoffended within 5 years of release from

[3] See §§ 71-1202 and 71-1205.

incarceration and 40 percent sexually reoffended within 15 years of release from incarceration. Within the same reference group, 42 percent violently reoffended within 5 years of release from incarceration and 52 percent violently reoffended within 15 years of release from incarceration.

The PCL:R assesses whether an individual's behavior is consistent with psychopathy, or whether the individual has personality features that are consistent with interpersonal explosiveness and antisociality. Newring diagnosed O.S. with psychopathy based upon O.S.' score of 29.

SORAG is an actuary-based instrument that estimates a sex offender's risk for repeating a violent offense, which includes sexual reoffense and violent nonsexual reoffense. It uses risk factors that researchers have empirically linked with repeat violent offenders. O.S. scored a 15 on the SORAG. Using as a reference other individuals who also scored a 15, Newring testified that O.S. had a violent recidivism probability of 58 percent within 7 years and 76 percent within 10 years. In sum, Newring explained that three-fourths of the individuals in the reference group who scored a 15 on SORAG were convicted of a violent reoffense within 10 years of their release from prison.

Based on a reasonable degree of psychological certainty, Newring diagnosed O.S. with (1) exhibitionism; (2) paraphilia, not otherwise specified, nonconsent, which means he derives sexual gratification by having sexual interactions with a nonconsenting partner; and (3) a personality disorder, not otherwise specified, psychopathy. Because of mental illness or other factors, Newring concluded that O.S. lacked the capacity and volitional control to refrain from engaging in sexually inappropriate acts. Based upon that diagnosis, Newring testified that O.S. was a dangerous sex offender.[4]

But Newring did not testify whether less restrictive treatment than inpatient or outpatient treatment would be sufficient for O.S. Newring also disclosed that from the evidence in O.S.' record, O.S. had not completed any sexual offender treatment while incarcerated. Newring testified that if he were to evaluate O.S. as a newly admitted prisoner, he would recommend

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[4] See Neb. Rev. Stat. § 83-174.01(1)(a) (Cum. Supp. 2008).

that he remain in the inpatient section of the prison to receive treatment. Corrections has three levels of treatment for incarcerated sex offenders: an individual study program where prisoners remain in the general population but follow a treatment program and meet with counselors; an outpatient program where inmates occupy living units at the Omaha Correctional Center and the Nebraska State Penitentiary and attend weekly treatment sessions; and the inpatient program, which is the most restrictive treatment environment for sex offenders within Corrections. The inpatient treatment program is at the Lincoln Correctional Center and places a sex offender in a controlled setting with little freedom to move around the facility. Newring declined to state what treatment O.S. should receive once the State released him from prison. He did, however, testify that if O.S. were presented for incarceration, he would receive the most restrictive, most intensive treatment available through Corrections.

Based upon Newring's testimony, the Board found O.S. was a dangerous sex offender under § 83-174.01(1)(a) and committed him to involuntary, inpatient treatment. The district court affirmed. Because of the constitutional issues, we granted O.S.' petition to bypass the Nebraska Court of Appeals.

O.S. assigns three errors. First, O.S. asserts that SOCA is unconstitutional under the U.S. Constitution and the Nebraska Constitution because (1) it is an impermissible ex post facto law, (2) it violates double jeopardy, and (3) it violates equal protection. Second, O.S. asserts the Board erred in finding that O.S. is a dangerous sex offender. Third, he claims that the Board erred in finding that neither voluntary hospitalization nor other treatment alternatives less restrictive were available as required by § 71-1209. Under § 71-1209(1),

> [t]he state has the burden to prove by clear and convincing evidence that (a) the subject is a dangerous sex offender and (b) neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the mental health board are available or would suffice to prevent the harm described in subdivision (1) of section 83-174.01.

As previously stated, we addressed the constitutionality of SOCA in *In re Interest of J.R.*[5] We concluded that SOCA does not violate the Ex Post Facto Clause, the Double Jeopardy Clause, or the Equal Protection Clause. Our ruling in *In re Interest of J.R.* resolves O.S.' constitutional claims.

Besides his constitutional arguments, O.S. makes three arguments concerning the sufficiency of the State's evidence. He claims that (1) the State failed to present evidence of a "recent act," (2) the evidence does not support the Board's finding that he is a dangerous sex offender, and (3) involuntary, inpatient treatment is the least restrictive alternative.

[1,2] As we know, the district court reviews the determination of a mental health board de novo on the record.[6] And in reviewing a district court's judgment, we will affirm the judgment unless we find, as a matter of law, that clear and convincing evidence does not support the judgment.[7]

We first address O.S.' "recent act" argument. O.S. asserts that for involuntary commitment under SOCA to comply with due process, the State must prove a "recent act" that shows he is dangerous. He claims that his conviction in 1986 is not a recent act probative of whether he will be dangerous in the future. Thus, he argues the State failed to prove a recent violent act indicating that he is likely to engage in repeat acts of sexual violence.[8]

O.S.' "recent act" argument is based on the statutory requirements of the Nebraska Mental Health Commitment Act (MHCA), not SOCA. We conclude that O.S.' reliance on our holdings under MHCA is misplaced, because neither due process principles nor SOCA requires the State to prove a recent act probative of a sex offender's dangerousness.

Nebraska has two methods for committing individuals suffering from mental illness: SOCA and MHCA.[9] Both aim to

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[5] See *In re Interest of J.R.*, *supra* note 2.

[6] *Id.*

[7] See *id.*

[8] See *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

[9] See Neb. Rev. Stat. § 71-901 to 71-962 (Cum. Supp. 2006).

confine and provide treatment to mentally ill persons who pose a risk to society.[10] But there is a critical distinction—the acts focus on different individuals. MHCA applies to any person who is mentally ill and dangerous.[11] SOCA applies specifically to convicted sex offenders who have completed their jail sentence but continue to pose a threat of harm to others.[12] While both require that the individual be proved dangerous, because the acts focus on two different groups of individuals, the conditions for commitment under each act also differ.

We have stated that due process requires the State to show that the need for confinement be based upon "'a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied.'"[13] Under MHCA, a mentally ill and dangerous person is one who is mentally ill or substance dependent and whose condition presents "[a] substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm."[14] To confine an individual against his will under MHCA, the State must show that the individual is mentally ill and that "'"he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another."'"[15]

SOCA has different statutory requirements for declaring a sex offender dangerous. It does not require proof of a recent act of violence or threats or placing others in fear. But its requirements are sufficient to satisfy due process.

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[10] See *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002).

[11] § 71-901.

[12] § 71-1202.

[13] *In re Interest of J.R.*, *supra* note 2, 277 Neb. at 386, 762 N.W.2d at 325, quoting *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981).

[14] § 71-908(1).

[15] *In re Interest of Kochner*, *supra* note 8, 266 Neb. at 121, 662 N.W.2d at 202, quoting *In re Interest of Blythman*, *supra* note 13. Accord *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

[3] SOCA requires that the State show that the person is a dangerous sex offender[16] and suffers from a "mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior."[17] Thus, although SOCA does not statutorily require a showing of a recent act of violence, it satisfies due process by requiring the State to prove that a substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied.

[4,5] We next address O.S.' assertion that the State did not prove he was dangerous. As outlined above, for O.S. to be a dangerous sex offender under SOCA, the State must prove by clear and convincing evidence that he is likely to engage in repeat acts of sexual violence and that he is substantially unable to control his criminal behavior.[18] "Likely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public."[19] And unable to control criminal behavior means "having serious difficulty in controlling or resisting the desire or urge to commit sex offenses."[20] In sum, civil commitments under SOCA and MHCA require that the mentally ill person be dangerous and that absent confinement, the person is likely to engage in particular acts which will result in substantial harm to himself or others.[21]

[6,7] In determining whether a person is dangerous, the focus must be on the person's condition at the time of the hearing.[22] Actions and statements of a person alleged to be mentally

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[16] § 71-1209(1).

[17] § 83-174.01(1)(a).

[18] §§ 71-1209(1), 71-1203(1), and 83-174.01(1)(a).

[19] § 83-174.01(2).

[20] § 83-174.01(6). See, also, *Crane, supra* note 10.

[21] See *In re Interest of J.R., supra* note 2. See, also, *In re Interest of Blythman, supra* note 13.

[22] *Id.*

ill and dangerous which occur before the hearing are probative of the subject's present mental condition.[23] But, for a past act to have evidentiary value, the past act must have some foundation for a prediction of future dangerousness, thus being probative of that issue.[24] Although assessment of whether a person will be dangerous calls for a medical decision, the sufficiency of the evidence required to support such a decision presents a legal question.[25]

The Board relied on Newring's testimony that O.S. was a dangerous sex offender. He testified that O.S. has a sexual assault recidivism risk of 33 percent within 5 years and 40 percent within 15 years. He has a violent recidivism probability of 58 percent within 7 years and 76 percent within 10 years. He also diagnosed O.S. with psychopathy personality disorder, exhibitionism, and paraphilia. Newring also opined that O.S. lacks the capacity or control, because of mental illness or other factors, to refrain from engaging in a sexually inappropriate act. And, if released into the community, O.S. would pose a threat to others. O.S. presented no evidence contesting Newring's findings. O.S. also did not challenge the recidivism rates for his scores. We conclude that Newring's evaluation was sufficient and probative of whether O.S. remains a danger to society.

Finally, we turn to O.S.' argument that involuntary, inpatient treatment was more restrictive than other alternative treatment. Under § 71-1209(1)(b), the State must prove that neither voluntary hospitalization nor other alternative treatment less restrictive than inpatient treatment would prevent the individual from harming himself or others. O.S. argues that the State presented no evidence regarding the least restrictive treatment alterative. He contends the State's evidence fails, because the State's expert, Newring, only testified as to the treatment O.S. would receive should he remain incarcerated.

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[23] *Id.*

[24] *Id.*

[25] *Id.*

Specifically, Newring testified that the referral question he received from the State was whether O.S. was a dangerous sex offender. He stated that he was not asked to give an opinion on the least restrictive treatment alternative. He stated:

> [T]he referral question that I'm ethically obliged to answer is does a person meet criteria for dangerous sex offender based on the information available to me, and that's all that the law requests me to do. To go beyond that would be inappropriate, so I was just going to answer the question that's asked within the law . . . .

Newring went on to state that he could not "speak to what [treatment options] community providers would offer." He could only state what treatment options would be available within Corrections.

We conclude that the State failed to prove by clear and convincing evidence that no other alternative treatment less restrictive than involuntary, inpatient treatment was sufficient. Newring's testimony reflected treatment options available only within Corrections. Because the State presented no evidence regarding treatment options outside Corrections, we reverse the district court's decision that involuntary, inpatient treatment is the least restrictive treatment alternative. We remand the cause back to the district court with directions to remand the matter back to the Board, so that the Board can determine the least restrictive treatment alternative as required under § 71-1209(1)(b).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF D.V., ALLEGED TO BE A DANGEROUS SEX OFFENDER.
D.V., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

763 N.W.2d 717

Filed April 10, 2009. No. S-08-446.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record.

2. **Judgments: Appeal and Error.** In reviewing a district court's judgment, an appellate court will affirm the judgment unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Sean M. Conway for appellant.

Michael W. Jensen, Deputy Douglas County Attorney, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

D.V. was convicted in 2002 of first degree sexual assault on a child. In October 2007, a petition was filed asking that he be found to be a dangerous sex offender pursuant to the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. §§ 71-1201 to 71-1226 (Cum. Supp. 2008). The Mental Health Board of the Fourth Judicial District (Board) found him to be a dangerous sex offender and ordered him committed to the Nebraska Department of Health and Human Services for inpatient sex offender treatment. The Douglas County District Court affirmed the commitment, and D.V. appeals.

SCOPE OF REVIEW

[1,2] The district court reviews the determination of a mental health board de novo on the record. *In re Interest of O.S., ante* p. 577, 763 N.W.2d 723 (2009); *In re Interest of J.R., ante* p. 362, 762 N.W.2d 305 (2009). In reviewing a district court's judgment, an appellate court will affirm the judgment unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment. *In re Interest of O.S., supra*.

FACTS

The victim of D.V.'s sexual assault was the 4-year-old daughter of his half sister. D.V. was sentenced to a term of 6 to 10 years in prison. On October 12, 2007, a petition was

filed pursuant to SOCA, alleging that D.V. was a dangerous sex offender as defined by Neb. Rev. Stat. § 83-174.01 (Reissue 2008) and that inpatient hospitalization was the least restrictive treatment available.

At a hearing before the Board, Mark Weilage, Ph.D., assistant behavioral health administrator for mental health for the Nebraska Department of Correctional Services, testified and a psychological evaluation of D.V. completed by Weilage was received into evidence. Weilage reported that D.V. had refused to be screened for the inpatient sex offender program and that he had not completed any mental health programming during his incarceration. D.V. denied that he committed the sexual assault for which he was incarcerated, but he admitted that there had been several prior instances in which he had fondled the genitals or breasts of a female younger than himself.

Weilage administered to D.V. the "Static-99" instrument, which is used to estimate the risk of sexual recidivism among sex offenders. D.V.'s score of 3 placed him in the low-moderate risk category for committing a future sex offense. Of individuals in a reference group who had a score of 3 on the Static-99, 12 percent sexually reoffended within 5 years and 19 percent reoffended in 15 years. On another measure, the "Stable 2000," D.V. fell in the high-risk range with a score of 10 out of 12 for dynamic risk factors.

Weilage stated that D.V. showed evidence of intimacy deficits, some sexual preoccupations, attitudes supportive of sexual assault, lack of treatment involvement, negativity, and a general lack of concern for others. On the "Psychopathy Checklist: Screening Version," a 12-item scale designed to assess an individual's demonstration of behaviors consistent with psychopathy, D.V. scored 20 out of 24, which placed him at the 89.9 percentile rank. According to Weilage, individuals with a total score of 18 or more are "considered likely psychopathic and further evaluation is recommended." Of concern to Weilage were D.V.'s "superficiality, his deceitfulness, his lack of remorse and empathy, and the fact that he does not accept responsibility for his actions."

Weilage stated that D.V. had a long history of sexually deviant behavior, a longstanding interest in younger females, and

a significant preoccupation with sex in general. D.V. "would appear to meet criteria for pedophilia based on his past behavior, but his sexual deviance and dynamic risk factors go beyond that relatively simple diagnosis." Weilage also said the presence of a personality disorder negatively impacted D.V.'s ability to manage his sexual deviance.

Weilage's professional opinion was that D.V. meets the criteria of § 83-174.01 to be classified as a dangerous sex offender. He had been convicted of one sex offense and had an "Axis I" mental health diagnosis of pedophilia, which would increase his likelihood of engaging in repeat acts of sexual violence. D.V. has a personality disorder and dynamic risk factors that increase his overall risk for problematic behaviors in the future, including problematic sexual behaviors. Weilage stated that D.V. has "little awareness of how to begin to mitigate his risk for re-offense." D.V. does not have a functional relapse prevention plan; a specific, stable, and supportive aftercare plan; or an established treatment plan with a community treatment provider. Weilage reported that D.V. "does not see the need for any type of sex offender treatment" and should be considered an untreated sex offender. D.V.'s static actuarial assessment places him in the low-moderate risk category, but the assessment did not account for the presence of pedophilia, a personality disorder, and "significant dynamic risk factors which significantly increase his risk for sexual reoffense."

Weilage testified that D.V. is not a candidate for outpatient treatment. D.V. would need a minimum of "a couple years [of inpatient treatment], if he was able to fully engage in the treatment and take advantage of what they had to offer." Weilage stated that D.V. had not shown remorse for his behavior, which is necessary to start treatment. Weilage stated, based on his evaluation and knowledge of D.V., that D.V. is a likely risk to reoffend if not provided treatment as an inpatient.

After a hearing, the Board found by clear and convincing evidence that D.V. is a dangerous sex offender as defined by § 83-174.01 and that neither voluntary hospitalization nor other less restrictive treatment is appropriate. The Board ordered

D.V. placed in the custody of the Department of Health and Human Services for inpatient sex offender treatment.

D.V. appealed the Board's determination to the Douglas County District Court, claiming that SOCA is unconstitutional; that the Board erred in admitting the record of D.V.'s 2002 conviction, which contained hearsay evidence; and that the Board erred in finding there was clear and convincing evidence that D.V. was a dangerous sex offender and that the treatment plan was the least restrictive alternative.

The district court found SOCA to be constitutional. The court declined to consider the error concerning the admission of evidence, because it was not assigned and argued in D.V.'s brief. The court found clear and convincing evidence to support the Board's finding that D.V. is a dangerous sex offender. The court also found clear and convincing evidence to support the Board's finding that inpatient treatment was the least restrictive and was the most appropriate for D.V. The court affirmed the Board's decision. D.V. appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

On appeal, D.V. challenges the constitutionality of SOCA. He argues that the law violates double jeopardy and equal protection and is an impermissible ex post facto law. He also claims the Board erred in finding that he is a dangerous sex offender as defined by § 83-174.01 and in finding that neither voluntary hospitalization nor other less restrictive treatment was available and sufficient under § 71-1209.

ANALYSIS

Constitutional Claims

D.V. argues that SOCA is unconstitutional as an ex post facto law, as a violation of the Double Jeopardy Clause, and as a violation of his right to equal protection. We recently addressed these issues in *In re Interest of J.R.*, *ante* p. 362, 762 N.W.2d 305 (2009). We concluded that SOCA does not violate the Ex Post Facto Clause, the Double Jeopardy Clause, or the Equal Protection Clause. Because *In re Interest of J.R.*

controls our decision on these issues, we proceed to consider the remaining assignments of error.

Clear and Convincing Evidence

Section 83-174.01(1) defines a "[d]angerous sex offender" as

> (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.

The statute provides additional definitions. "Likely to engage in repeat acts of sexual violence means the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public." § 83-174.01(2). A "[p]erson who suffers from a mental illness" is "an individual who has a mental illness as defined in section 71-907." § 83-174.01(3). A person with a personality disorder is one who has been diagnosed as such. § 83-174.01(4). "Substantially unable to control his or her criminal behavior" is defined as "having serious difficulty in controlling or resisting the desire or urge to commit sex offenses." § 83-174.01(6).

D.V. claims the Board erred in concluding that he is a dangerous sex offender, because there was insufficient evidence to conclude that he suffers from a mental illness which makes him likely to violently reoffend in a sexual manner or to be unable to control his criminal behavior. As we noted in *In re Interest of J.R., ante* at 386, 762 N.W.2d at 325, "[t]he key to confinement of a mentally ill person lies in finding that the person is dangerous and that, absent confinement, the mentally ill person is likely to engage in particular acts which will result in substantial harm to himself or others."

D.V. argues that the State cannot prove his dangerousness to others without evidence of a recent act. In *In re Interest of J.R.*,

we reviewed a similar argument. We noted that SOCA does not mention whether a recent act is necessary to reach a finding of dangerousness. Without deciding whether the recent act requirement must be fulfilled, we found that the State demonstrated that J.R. was a dangerous sex offender.

However, in *In re Interest of O.S., ante* p. 577, 763 N.W.2d 723 (2009), we stated that neither due process principles nor SOCA requires the State to prove a recent act probative of a sex offender's dangerousness. Weilage determined that D.V. is a pedophile, suffers from alcohol dependence, and has a personality disorder. D.V. did not take part in any treatment programs while incarcerated and, in fact, refused to be screened for the inpatient sex offender program. D.V. refused to accept responsibility for the sexual assault for which he was incarcerated, although he told Weilage of several other instances when he was a teenager in which he fondled the genitals of his 6- or 7-year-old sister and fondled the breasts of his 13-year-old sister and his sister's friend.

In addition, D.V. argues that there is no evidence other than his conviction and his admissions to show he is unable to control his impulses and that he fell within the low-moderate range on the Static-99 test, which measures the probability of reoffending. However, Weilage reported that D.V. was in the high-risk range on another instrument that measured risk factors. There is clear and convincing evidence to find that D.V. is a dangerous sex offender.

Appropriate Treatment

Finally, D.V. claims the Board erred in finding that neither voluntary hospitalization nor other less restrictive treatment alternatives were available. D.V. argues that Weilage did not explore any outpatient treatment alternatives for D.V.

Weilage determined that D.V. was not a candidate for outpatient treatment and that he would need a minimum of 2 years of inpatient treatment. Weilage stated that D.V. would benefit from inpatient treatment only if he "fully engaged" in it. D.V.'s failure to demonstrate remorse for his behavior would be a hindrance for him in benefiting from treatment. Weilage said

he believed D.V. was at risk to reoffend if he did not receive inpatient treatment.

D.V. did not take part in any mental health treatment while incarcerated. He did not agree to be screened for the inpatient sex offender program available through the Department of Correctional Services. There was clear and convincing evidence to support the Board's finding that the least restrictive alternative for D.V. is inpatient treatment.

CONCLUSION

In *In re Interest of J.R., ante* p. 362, 762 N.W.2d 305 (2009), we concluded that SOCA is not an ex post facto law and does not violate either double jeopardy or equal protection. We conclude that the Board's finding that D.V. is a dangerous sex offender is supported by clear and convincing evidence. We also find that inpatient treatment is the least restrictive alternative for D.V.

The district court affirmed the decision of the Board. In reviewing a district court's judgment, an appellate court will affirm the judgment unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment. *In re Interest of O.S., ante* p. 577, 763 N.W.2d 723 (2009). The district court's judgment was supported by clear and convincing evidence, and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOSHUA D. HAMILTON, APPELLANT.
763 N.W.2d 731

Filed April 10, 2009. No. S-08-506.

1. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

3. **Convicted Sex Offender: Statutes: Legislature: Intent.** Nebraska's Sex Offender Registration Act is a civil regulatory scheme intended by the Legislature to protect the public from the danger posed by sex offenders.
4. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. ____: ____. If possible, an appellate court will try to avoid a statutory construction which would lead to an absurd result.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
7. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, John C. Jorgensen, and Ti'era M. Johnson, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Pursuant to a plea agreement resulting in the dismissal of more serious charges and an agreement by the State not to file additional charges, Joshua D. Hamilton entered pleas of no contest to one count of third degree sexual assault of a child, a Class IIIA felony,[1] and one count of attempted first degree sexual assault, a Class III felony.[2] The district court for Lancaster County accepted the pleas and convicted Hamilton of the two offenses. At a sentencing hearing, the court determined that Hamilton had committed an "aggravated offense" as defined in the Sex Offender Registration Act (SORA)[3] and would

[1] See Neb. Rev. Stat. § 28-320.01 (Reissue 2008).

[2] See Neb. Rev. Stat. §§ 28-201(1)(b) and 28-319(2) (Reissue 2008).

[3] Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008).

be subject to the lifetime registration requirement of SORA and the lifetime community supervision requirement of Neb. Rev. Stat. § 83-174.03 (Reissue 2008). The court sentenced Hamilton to 3 to 5 years' imprisonment for the offense of third degree sexual assault of a child and 10 to 15 years' imprisonment for the offense of attempted first degree sexual assault, with the sentences to run consecutively and credit given for time served. Hamilton perfected this timely appeal.

FACTS

In 2007, two children under the age of 12 reported that they had been sexually assaulted by Hamilton. Hamilton's biological daughter reported that Hamilton touched her with his hands and penis on top of and under her clothing and that he penetrated her vagina with his penis. The daughter of a woman to whom Hamilton was married in 2007 reported that Hamilton had penetrated her vagina with his finger and penis on numerous occasions over a 3-year period.

When interviewed regarding these reports, Hamilton told police that he used drugs and alcohol while caring for the children and could not recall assaulting either one of them. Hamilton told police it was possible that he had assaulted the girls during a drug- or alcohol-induced blackout. He also stated that he believed the girls were telling the truth.

Hamilton was originally charged with two counts of third degree sexual assault of a child and one count of first degree sexual assault of a child. He eventually entered into the plea agreement described above, resulting in his conviction on one count of third degree sexual assault of a child and one count of attempted first degree sexual assault. The factual basis provided by the prosecutor at the plea hearing included the reports of the minor victims that Hamilton had sexually penetrated them on several occasions. The court offered Hamilton the opportunity to comment on the facts as recited by the prosecutor, but Hamilton declined.

At the sentencing hearing, Hamilton's counsel argued that because sexual penetration was not an element of either of the offenses for which Hamilton was convicted, neither crime could be considered an "aggravated offense" under

SORA. SORA defines "aggravated offense" as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years."[4] In support of this argument, Hamilton's counsel relied on *State v. Mastne*,[5] a 2006 opinion in which the Nebraska Court of Appeals held that existence of an "aggravated offense" under SORA must be determined only from the statutory elements of the offense for which a defendant is convicted and that a judge may not make factual findings or determinations which go beyond such elements. The prosecutor argued that the court could make factual determinations regarding the existence of an aggravated offense based upon the uncontested factual bases for the pleas. Without discussing *Mastne*, the court made a determination that each of Hamilton's victims was under the age of 12 and that the facts warranted treating both crimes as aggravated offenses for purposes of SORA. The court notified Hamilton that he would be subject to a lifetime registration requirement under SORA and a lifetime community supervision requirement under § 83-174.03. The court then imposed the sentences described above. Hamilton perfected this timely appeal, and we granted the State's petition to bypass and motion for oral argument.

ASSIGNMENTS OF ERROR

Hamilton assigns, restated, that the district court erred (1) in determining that his offenses were aggravated offenses for purposes of SORA and lifetime community supervision and (2) by imposing excessive sentences that constituted an abuse of discretion.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation

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[4] § 29-4005(4)(a).

[5] *State v. Mastne*, 15 Neb. App. 280, 725 N.W.2d 862 (2006).

to resolve the questions independently of the conclusion reached by the trial court.[6]

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[7]

ANALYSIS

Aggravated Offense for Purposes of SORA and Lifetime Parole Supervision

[3] SORA is a civil regulatory scheme intended by the Legislature to protect the public from the danger posed by sex offenders.[8] SORA applies to any person who pleads guilty or is found guilty of certain offenses listed in § 29-4003(1). Included in that list are sexual assault of a child in the third degree[9]; first degree sexual assault of a child[10]; and attempt, solicitation, or conspiracy to commit an offense listed in § 29-4003(1)(a).[11] SORA includes a general requirement that persons convicted of these offenses must register with the sheriff of the county in which he or she resides[12] during any period of supervised release, probation, or parole and "for a period of ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent."[13] Certain sex offenders, including those who commit an aggravated offense, are subject to a lifetime registration requirement.

The lifetime community supervision requirement of § 83-174.03 incorporates and mirrors the lifetime registration

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[6] See *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

[7] *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

[8] See, *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[9] § 29-4003(1)(a)(iv).

[10] § 29-4003(1)(a)(v).

[11] § 29-4003(1)(a)(xiv).

[12] § 29-4004(1).

[13] § 29-4005(1).

requirement of SORA.[14] A defendant who commits an aggravated offense as defined by SORA "shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life."[15]

SORA defines an aggravated offense as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years."[16] The question presented in this appeal is whether, as Hamilton contends, a court may look only to the statutory elements of the offense in making the "aggravated offense" determination or whether, as the State argues, a court may consider facts in the record regarding the manner in which the offense was committed.

In *Mastne*, the Court of Appeals held that only the elements of the offense could be considered in determining whether it was an "aggravated offense" under SORA. In reaching this conclusion, the court compared the language of § 29-4005(2) with that of § 29-4005(3)(a), which subjects a sex offender determined to be a "sexually violent predator" to, inter alia, a lifetime registration requirement. The statute provides in relevant part:

> (2) A person required to register under section 29-4003 shall be required to register under the act for the rest of his or her life if the offense creating the obligation to register is an aggravated offense, if the person has a prior conviction for a registrable offense, or if the person is required to register as a sex offender for the rest of his or her life under the laws of another state, territory, commonwealth, or other jurisdiction of the United States. A sentencing court shall make that fact part of the sentencing order.
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> (3)(a) When sentencing a person for a registrable offense under section 29-4003, a court may *also* determine if the

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[14] *State* v. *Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[15] § 83-174.03(1).

[16] § 29-4005(4)(a).

> person is a sexually violent predator. When making its determination the court shall consider information contained in the presentence report and the recommendation of experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies.[17]

The Court of Appeals found the difference in the language used in § 29-4005(2) and (3)(a) to be significant. It reasoned that the language used by the Legislature in § 29-4005(3)(a) made it clear that the court was to make a factual determination of whether an offender was a "sexually violent predator." The *Mastne* court reasoned that by omitting language similar to the second sentence of § 29-4005(3)(a) from § 29-4005(2), "the Legislature made it equally clear that it did not intend for the sentencing court to make a factual finding or determination regarding whether or not an offense is 'an aggravated offense.'"[18]

We do not find the meaning of § 29-4005(2) to be quite so clear. The second sentence of that subsection refers to the existence of an aggravated offense or other grounds for lifetime registration as a "fact" which is to be made a part of the sentencing order. This suggests that some factfinding is necessary, and we have stated that the statute "require[s] the court, as part of the sentence, to determine if the defendant committed an aggravated offense."[19] Had the Legislature intended that the "fact" of penetration for purposes of an aggravated offense determination should be derived solely from the elements of the offense, it could have used specific language to that effect. For example, the Legislature has enacted a statute providing that an offender may be required to submit to a human immunodeficiency virus antibody or antigen test if he or she has been convicted of certain specified offenses "or any other offense under Nebraska law when sexual contact or sexual

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[17] § 29-4005(2) and (3)(a) (emphasis supplied).

[18] *State v. Mastne*, *supra* note 5, 15 Neb. App. at 290-91, 725 N.W.2d at 870.

[19] *State v. Worm*, *supra* note 8, 268 Neb. at 80, 680 N.W.2d at 158.

penetration is an element of the offense."[20] We conclude that § 29-4005(2) is ambiguous as to whether the sentencing court may make a factual finding in determining that the offense committed by a particular defendant under § 29-4005(4)(a) "involves the penetration of . . . a victim under the age of twelve years" for purposes of determining the existence of an aggravated offense under SORA. Accordingly, the statute is open to construction.

[4-6] When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[21] If possible, an appellate court will try to avoid a statutory construction which would lead to an absurd result.[22] Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.[23]

In enacting SORA, the Legislature made findings that "sex offenders present a high risk to commit repeat offenses" and that the "efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction."[24] The Legislature further found that "state policy should assist efforts of local law enforcement agencies to protect their communities" by requiring registration of sex offenders.[25] By imposing a 10-year registration

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[20] Neb. Rev. Stat. § 29-2290(1) (Reissue 2008).

[21] *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006); *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

[22] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007); *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[23] *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006); *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

[24] § 29-4002.

[25] *Id.*

requirement for some sex offenders but a lifetime registration requirement for others, including those who commit aggravated offenses, the Legislature clearly intended to provide enhanced assistance to law enforcement and protection to the public with respect to sex offenders who commit aggravated offenses.[26] That intention would be frustrated if a person who had in fact sexually penetrated a victim under the age of 12 years would be exempted from the lifetime registration requirement simply by pleading to a lesser offense which does not involve the element of penetration.

We agree with the Court of Appeals that § 29-4005(2) and (3)(a) should be read together, because both relate to a lifetime registration requirement for certain sex offenders. However, contrary to the reasoning of *Mastne*, we discern a consistency in the two statutory provisions. The use of the word "fact" in the second sentence of § 29-4005(2) read in conjunction with the word "also" in the first sentence of § 29-4005(3)(a) indicates a legislative intent that there be a factual determination by the sentencing judge under both statutory provisions.

Applying the reasoning of *Mastne* to § 29-4005(2) would, in our view, lead to an absurd result. Sexual penetration is an element in only three of the registrable offenses currently listed in § 29-4003: first degree sexual assault,[27] first degree sexual assault on a child,[28] and incest of a minor.[29] None of these include an element of "use of force or the threat of serious violence,"[30] and thus, applying the reasoning of *Mastne*, only first degree sexual assault of a child as currently defined in § 28-319.01 would meet all requirements for an aggravated offense under § 29-4005(4)(a). However, § 28-319.01 was first enacted in 2006.[31] Prior to that time, the offense of

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[26] See § 29-4005(1) and (2).

[27] § 28-319.

[28] Neb. Rev. Stat. § 28-319.01 (Reissue 2008).

[29] Neb. Rev. Stat. § 28-703 (Reissue 2008).

[30] See § 29-4005(4)(a).

[31] 2006 Neb. Laws, L.B. 1199, § 6.

sexual assault of a child did not include penetration as an element.[32] Thus, in 2002, when the Legislature amended SORA to provide a lifetime registration requirement for those committing aggravated offenses,[33] there were no existing offenses with elements strictly corresponding to the definition of an aggravated offense in § 29-4005(4)(a)(ii). This indicates that the Legislature intended the existence of an aggravated offense to be determined on the basis of actual facts, not statutory elements.

We therefore conclude that under SORA, a sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense as defined in § 29-4005(4)(a) has been committed. Instead, the court may make this determination based upon information contained in the record, including the factual basis for a plea-based conviction and information contained in the presentence report. To the extent that *Mastne* holds otherwise, it is disapproved.

In this case, the factual basis received at the time of Hamilton's pleas and the information included in the presentence investigation report support the finding of the district court that Hamilton committed aggravated offenses which subject him to the lifetime registration requirement of SORA.

Excessive Sentences Claim

Hamilton's sentences fall within the statutory limits for third degree sexual assault of a child and attempted first degree sexual assault. Third degree sexual assault of a child is a Class IIIA felony,[34] punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both, with a minimum of zero year's imprisonment.[35] Hamilton was sentenced to a period of imprisonment of 3 to 5 years for this offense. Attempted first degree sexual assault is a Class III felony,[36] punishable by a

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[32] See § 28-320.01 (Cum. Supp. 2004) (quoted in *State v. Mastne*, *supra* note 5).

[33] 2002 Neb. Laws, L.B. 564, § 5. See *State v. Worm*, *supra* note 8.

[34] § 28-320.01(3).

[35] Neb. Rev. Stat. § 28-105 (Reissue 2008).

[36] §§ 28-201(1)(b) and 28-319(2).

minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment, a $25,000 fine, or both.[37] Hamilton was sentenced to 10 to 15 years' imprisonment for this offense. Thus, we review the sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[38]

[7] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[39] Hamilton argues the trial court abused its discretion by not giving proper weight and consideration to these factors when imposing his sentence. He argues that the sentencing order neglected his individual circumstances and that the trial court failed to assess the most effective rehabilitation measure, which Hamilton believes would include drug and alcohol rehabilitation.

At the time of sentencing, the court stated that "[h]aving regard for the nature and circumstances of the crimes and the history, character and condition of [Hamilton], the Court finds that imprisonment of [Hamilton] is necessary because a lesser sentence would depreciate the seriousness of his crimes and promote disrespect for the law." Hamilton was 29 years old at the time of sentencing. The presentence investigation assessed Hamilton at a very high risk to reoffend and noted that he had substantial and long-running alcohol and drug abuse problems. Hamilton's record included juvenile offenses committed in 1993 and 1995 and numerous adult offenses committed between 1996 and 2007. While none of the prior adult offenses were felonies and the district court characterized them as "'[r]elatively minor,'" they indicate a pattern of unlawful behavior. The district court acknowledged the fact

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[37] § 28-105.

[38] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[39] *State v. Davis*, *supra* note 38; *State v. Reid*, *supra* note 38; *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

that Hamilton's no contest pleas spared his young victims from having to testify, but it is also true that Hamilton benefited from the plea agreement.

Taking into consideration all of the relevant factors, we conclude that the district court did not abuse its discretion in sentencing Hamilton as it did.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court sentencing Hamilton to terms of incarceration for each of the two offenses for which he was convicted and imposing the requirements of lifetime registration and community supervision.

AFFIRMED.

GERRARD, J., participating on briefs.

HAUPTMAN, O'BRIEN, WOLF & LATHROP, P.C., APPELLEE, V. LOUIS J. TURCO, JR., AND LUCIA TURCO, APPELLANTS.

764 N.W.2d 393

Filed April 17, 2009. No. S-07-1271.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Attorney Fees.** Once the existence of a fee agreement is established, an attorney fee computed pursuant to the fee agreement is subject to the same standard of reasonableness as any other attorney fee.
4. **Attorney Fees: Proof.** Once a lawyer has established a prima facie case that a demanded fee is reasonable, judgment as a matter of law is precluded only if the client produces specific evidence on factors relevant to the reasonableness of the fee. Only at that point does the client show a genuine issue of material fact, so as to place the burden on the lawyer to persuade the trier of fact that the fee demanded is reasonable under the circumstances.
5. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Jeff T. Courtney, P.C., L.L.O., for appellants.

Terry M. Anderson and Melany S. Chesterman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

Matthew A. Lathrop and Kate E. Placzek for amicus curiae Nebraska Association of Trial Attorneys.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

Following remand from this court, the district court for Douglas County granted the motion for summary judgment filed by the appellee law firm, Hauptman, O'Brien, Wolf & Lathrop, P.C., and awarded an attorney lien in the amount of $64,600 in favor of appellee and against appellants, Louis J. Turco, Jr., and Lucia Turco. Appellants appeal. Because appellee presented sufficient evidence to establish that its demanded fee was reasonable, and appellants did not provide any evidence refuting appellee's evidence, we affirm.

STATEMENT OF FACTS

This court has previously addressed the issues raised in this appeal in *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007) (*Turco I*). The facts surrounding the events that occurred prior to *Turco I* are recited in that opinion, and will not be restated in detail here. In summary, appellants hired appellee to represent them in a serious personal injury matter. The parties entered into a contingent fee agreement in which appellants agreed to pay appellee 33⅓ percent of any recovery by judgment or by settlement. The matter settled promptly. Prior to accepting the settlement, appellants terminated their relationship with appellee. Once appellants accepted the settlement, appellee requested its demanded fee of 33⅓ percent of the settlement received by appellants. Appellants objected to the amount of the fee

requested, arguing that the demanded fee was excessive for the amount of work completed by appellee. Appellee filed suit to recover its demanded fee. The district court for Douglas County granted appellee's motion for summary judgment, and appellants appealed to this court.

We considered the matter, and in *Turco I*, this court concluded that despite the existence of a contingent fee agreement between the parties, appellee must establish the reasonableness of its demanded fee. This court determined that, based on the evidence presented in the district court, appellee had not set forth enough evidence to meet its burden. The district court's grant of appellee's motion for summary judgment was reversed, and the matter was remanded for further proceedings on the reasonableness of appellee's demanded fee.

On remand, the district court held an evidentiary hearing on appellee's motion for summary judgment. As evidence of the reasonableness of its fee, appellee presented affidavits from experienced attorneys in the community. These affidavits were from attorneys with varying experience in insurance litigation, including counsel defending insurance carriers, counsel representing claimants, and in-house counsel. The affidavits stated in general that the work done representing appellants by the attorneys associated with appellee justified the fee. Specifically, the affidavits stated that the affiants knew the reputation of the attorneys representing appellants—Melany Chesterman and David Lathrop—and the appellee law firm and that Chesterman, Lathrop, and the law firm had an excellent reputation in the legal community. Many of the affiants stated that they had worked with Lathrop and Chesterman and that Lathrop and Chesterman possessed specialized skills and knowledge in representing seriously injured victims of automobile collisions. Several of the affiants indicated that the reputation of the law firm negotiating a settlement with an insurance carrier can influence the amount of time it takes to settle the lawsuit. Further, several of the affiants stated that, based on the affiants' knowledge of appellants' case, a 33⅓ percent contingent fee was a reasonable fee.

In response to appellee's evidence, appellants did not present any evidence refuting the affidavits proffered by appellee. The

district court sustained appellee's motion for summary judgment. Appellants once again appeal.

ASSIGNMENTS OF ERROR

Appellants claim that the district court erred in granting appellee's motion for summary judgment (1) because there were genuine issues of material fact as to whether appellee's fee agreement was reasonable and (2) because there were genuine issues of material fact as to whether appellee made fraudulent misrepresentations to appellants, knowing the misrepresentations to be fraudulent, and appellants relied on the statements in connection with appellee's representation and the fee agreement.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id*.

ANALYSIS

First Assignment of Error: Appellee Established That Its Fee Was Reasonable in This Matter.

Appellants argue that appellee did not present sufficient evidence to establish that its demanded fee was reasonable, because the affidavits submitted by appellee failed to specifically address the reasonableness of the fee with respect to the facts in this case. Appellee counters that it met its burden and that appellants failed to refute its evidence. We agree with appellee.

[3] In *Turco I*, we concluded that once the existence of a fee agreement is established, an attorney fee computed pursuant to the fee agreement is subject to the same standard of reasonableness as any other attorney fee. Therefore, because

the parties do not dispute the existence of a fee agreement, the main inquiry in this case is whether at the hearing on remand appellee presented sufficient evidence to establish its demanded fee was reasonable.

The concurring opinion in *Turco I* specifically addressed the conflict that exists between the parties here—what evidence each party needs to present to establish reasonableness in order either to successfully show the absence of a genuine issue of material fact or to avoid the district court's entering judgment as a matter of law. The concurrence stated that a lawyer can establish the extent and value of his or her services in a contingent fee case by producing evidence showing, for example, the results obtained, the quality of the work, and whether the lawyer's efforts substantially contributed to the result. *Turco I* (Gerrard, J., concurring; Connolly and McCormack, JJ., join). The concurrence then identified other factors relevant to the reasonableness of a contingent fee, including the time and labor required, the novelty and difficulty of the legal issues involved, the skill required to do the work properly, and the experience, reputation, and ability of the lawyer performing the services. *Id*. Acknowledging that the pertinent factors will differ from case to case, the concurrence concluded that the general inquiry should focus on the circumstances of the agreement and the work performed. *Id*.

The *Turco I* concurring opinion explained that once the attorney has established the reasonableness of his or her fee using the criteria discussed above, at that point, the evidentiary burden going forward shifts to the client, and the client must object to the evidence established by the attorney with specificity to demonstrate why the documented fees are not reasonable.

[4] We now adopt these standards discussed in the *Turco I* concurrence, including the following:

> [O]nce a lawyer has established a prima facie case that a demanded fee is reasonable, judgment as a matter of law is precluded only if the client produces specific evidence on factors relevant to the reasonableness of the fee. Only at that point does the client show a genuine issue of material fact, so as to place the burden on the lawyer to

> persuade the trier of fact that the fee demanded is reasonable under the circumstances.

273 Neb. at 934-35, 735 N.W.2d at 376 (Gerrard, J., concurring; Connolly and McCormack, JJ., join).

Furthermore, as was stated in the *Turco I* concurrence, we believe that courts should be reluctant to disturb contingent fee agreements freely entered into by knowledgeable and competent parties. Indeed, "[a] prompt and efficient attorney who achieves a fair settlement without litigation serves both the client and the interests of justice." *Id.* at 934, 735 N.W.2d at 376 (Gerrard, J., concurring; Connolly and McCormack, JJ., join).

Based on these principles, and referring to the record in this case, it is clear that appellee's evidence established a prima facie case that its demanded fee was reasonable, and because appellants offered no evidence, appellants failed to produce evidence specifically refuting the reasonableness of the fee.

Appellee provided affidavits from six individual attorneys with varying experience in the field of personal injury and insurance cases. The affiants stated that they knew Lathrop, Chesterman, and the law firm and that the individual attorneys and the law firm had an excellent reputation in the legal community. The affiants stated that this reputation was influential in the ability to swiftly settle insurance disputes and that law firms and attorneys without such experience may spend significantly more time to settle a similar claim.

Although appellants argue that the affidavits do not specifically address the reasonableness of the fee with respect to the facts in this matter, our review of the record is to the contrary. Several affiants stated that they were familiar with the details of appellants' case and that the contingent fee charged by appellee was reasonable in light of the facts and circumstances surrounding the collision, the injuries sustained, and the individuals involved. Indeed, one affiant opined that the insurance company was willing to pay the claim in this case quickly because of the excellent reputation of the lawyers in this case and that had counsel been less skilled, the case may have taken 18 months to settle. Further, another affiant stated that he had

reviewed appellants' file and that in his opinion, the result obtained for appellants was excellent.

We conclude that this evidence was sufficient to prove the reasonableness of appellee's fee. The proffered affidavits addressed the reasonableness of the fee as it pertained to the specific facts of this case, addressed the quality of the work performed, addressed the results obtained by the attorneys, and addressed how the attorneys' efforts substantially contributed to the result.

The evidentiary burden then shifted to appellants, who in response did not provide any evidence specifically refuting the statements made in these affidavits. Therefore, the district court properly granted summary judgment in favor of appellee.

Second Assignment of Error: The Assigned Error Is Not Argued in Appellants' Brief.

[5] As their second assignment of error, appellants state that the district court erred when it granted summary judgment, because there were genuine issues of material fact as to their affirmative defense of fraudulent inducement. In their brief, appellants recite the elements of fraudulent inducement and state in conclusory fashion that the facts would establish their claim. In their brief, appellants have not presented this court with any argument in support of their assertion, nor have they directed us to any material fact in evidence in the record which is in dispute. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Because appellants failed to argue their second assignment of error, this court will not consider the issue.

CONCLUSION

Appellee established a prima facie case that its demanded fee was reasonable, and appellants did not specifically refute such evidence. We affirm the order of the district court which granted appellee's motion for summary judgment.

AFFIRMED.

JOSEPH D. GALLEGOS, APPELLANT, V. TIMOTHY F. DUNNING, DOUGLAS COUNTY SHERIFF, APPELLEE.

764 N.W.2d 105

Filed April 17, 2009. No. S-08-221.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Mental Health: Federal Acts: Appeal and Error.** Whether a person has been committed to a mental institution within the meaning of 18 U.S.C. § 922(g)(4) (2006) is a question of federal law. However, an appellate court may seek guidance from Nebraska law as to the meaning of commitment.

Appeal from the District Court for Douglas County, JAMES T. GLEASON, Judge, on appeal thereto from the County Court for Douglas County, MARCENA M. HENDRIX, Judge. Judgment of District Court reversed, and cause remanded with directions.

J.K. Harker, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, and Renee L. Mathias for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

HEAVICAN, C.J.

INTRODUCTION

Joseph D. Gallegos appeals from the district court's order affirming the county court's denial of his application to register a handgun. We reverse, and remand with directions.

FACTUAL BACKGROUND

On October 9, 2001, Gallegos, a veteran, voluntarily sought treatment at a veterans hospital in Omaha, Nebraska. Gallegos was examined by Dr. Michelle Jorgensen. Following this examination, Jorgensen completed and filed a petition before the Mental Health Board of the Fourth Judicial District (MHB). In that petition, Jorgensen averred that she believed Gallegos to be mentally ill and she prayed for "a hearing to determine whether [Gallegos] is a mentally ill dangerous person."

The petition was signed by Jorgensen and by a deputy Douglas County Attorney and alleged that immediate custody

of Gallegos was necessary. Attached to the petition was an intake form completed with respect to Gallegos. On that form, Jorgensen indicated that Gallegos had both suicidal and homicidal thoughts, apparently as a result of the breakup of his marriage. According to Jorgensen, although Gallegos acknowledged such thoughts, he indicated that he would not act on them because of his religious beliefs and because he did not want to be incarcerated. The form also noted that Gallegos had suffered from posttraumatic stress disorder for 10 years and from depression.

That same day, October 9, 2001, the MHB issued an order appointing another doctor at the veterans hospital, Dr. William Marcil, as Gallegos' custodian "with the understanding that [Gallegos] is to be held in [Marcil's] custody . . . for care and treatment up to a period of 7 days from the date of this order." A hearing was scheduled for October 12.

On October 12, 2001, Gallegos filed before the MHB a request for a 90-day continuance so that he could complete inpatient treatment at the veterans hospital. In signing that form, Gallegos agreed that if he did not "fully comply with [his] treatment plan, the County Attorney may pursue civil commitment against [him]." On October 16, Gallegos' request was granted, and the petition was "continued for 90 days on recommendation of . . . Marcil . . . for reason the subject agrees to treatment at the mental hygiene clinic and [posttraumatic stress disorder] Clinic." On January 16, 2002, the MHB petition filed against Gallegos was dismissed.

Several years later, on December 26, 2006, Gallegos obtained a firearms certificate and purchase permit. On January 3, 2007, he presented a federal firearms application to the Omaha Police Department (OPD). That application was initially denied, because an investigation uncovered the October 9, 2001, MHB order on Gallegos' instant criminal history check. OPD then completed an investigation into Gallegos' application. OPD contacted the physician responsible for Gallegos' followup treatment, who provided documentation indicating that Gallegos was not a danger to himself or others. On January 19, 2007, OPD granted Gallegos' application and issued Gallegos his gun registration.

On February 1, 2007, Gallegos presented a federal firearms application, this time to Timothy F. Dunning, the Douglas County sheriff, for approval. At that time, the investigating deputy also checked Gallegos' instant criminal history check. In the course of that check, the deputy noted that Gallegos' initial application had been denied by OPD. The deputy then asked to see Gallegos' firearms certificate, which she proceeded to confiscate. The deputy also refused to issue Gallegos a gun registration. The deputy indicated that Gallegos' "[MHB] Order with hospital stay" was a "Federal Handgun Prohibitor."

Gallegos appealed the denial to the Douglas County Court. The county court affirmed the sheriff's decision and denied Gallegos' application. The district court affirmed. Gallegos appeals.

ASSIGNMENT OF ERROR

On appeal, Gallegos assigns that the district court erred in affirming the county court's finding that he had been committed to a mental institution for the purposes of 18 U.S.C. § 922(g)(4) (2006) and thus was ineligible to hold a firearms certificate.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[1]

ANALYSIS

The sole question presented by this appeal is whether Gallegos was committed to a mental institution for the purposes of 18 U.S.C. § 922(g)(4). Section 922(g) of the Gun Control Act of 1968 provides:

> It shall be unlawful for any person . . .
>
> (4) who has been adjudicated as a mental defective or who has been committed to a mental institution . . .
>
> to . . . possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition

[1] *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008).

> which has been shipped or transported in interstate or foreign commerce.

In this case, there is no argument that Gallegos has ever been "adjudicated as a mental defective." As such, we are concerned only with whether Gallegos has been "committed to a mental institution." The Gun Control Act provides no definition for this term, but 27 C.F.R. § 478.11 (2008) states that

> [c]ommitted to a mental institution [means a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

(Emphasis omitted.)

[2] Whether a person has been committed to a mental institution within the meaning of § 922(g)(4) is a question of federal law.[2] We may, however, seek guidance from Nebraska law as to the meaning of "commitment."[3] The Eighth Circuit, in *United States v. Hansel*,[4] concluded that because the defendant was not committed under state law, he was not prohibited from possessing a firearm.[5] The Fifth Circuit has also adopted this approach.[6]

Under the version of the Nebraska Mental Health Commitment Act (MHCA)[7] in effect at the time of Gallegos' hospitalization, any person who believed another might be mentally ill and

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[2] *U.S. v. Giardina*, 861 F.2d 1334 (5th Cir. 1988); *U.S. v. Dorsch*, 363 F.3d 784 (8th Cir. 2004); *U.S. v. Whiton*, 48 F.3d 356 (8th Cir. 1995). See, also, *United States v. Hansel*, 474 F.2d 1120 (8th Cir. 1973).

[3] See, *U.S. v. Giardina*, *supra* note 2; *U.S. v. Dorsch*, *supra* note 2; *U.S. v. Whiton*, *supra* note 2.

[4] *United States v. Hansel*, *supra* note 2.

[5] Cf. *U.S. v. Dorsch*, *supra* note 2.

[6] *U.S. v. Giardina*, *supra* note 2.

[7] See Neb. Rev. Stat. § 83-1001 et seq. (Reissue 1999 & Cum. Supp. 2002) (now codified at Neb. Rev. Stat. § 71-901 et seq. (Reissue 2008)).

dangerous could communicate that belief to the county attorney.[8] If the county attorney agreed, he or she could file a petition with the local board of mental health stating such belief[9] and indicating whether the subject of the petition should be immediately taken into custody.[10]

Assuming it was necessary to take someone into immediate custody, a warrant would be issued for that purpose.[11] Under this circumstance, Nebraska law required the subject to be examined by a mental health professional within 36 hours unless the subject had been examined within the previous 24 hours.[12] A hearing was required

> to determine whether there [was] clear and convincing proof that the subject of a petition [was] a mentally ill dangerous person and that neither voluntary hospitalization nor other alternatives less restrictive of his or her liberty than a mental-health-board-ordered treatment disposition [were] available or would suffice to prevent the harm described in section 83-1009 [a substantial risk of harm to the subject or to others].[13]

After such a hearing, the governing mental health board could either conclude there was not clear and convincing evidence that a subject was a mentally ill dangerous person, and dismiss the petition,[14] or could conclude there was clear and convincing evidence that the subject was a mentally ill dangerous person.[15] If the subject was found to be mentally ill, and if the board made a determination that voluntary hospitalization would be sufficient to prevent any harm, then the board could dismiss the petition and unconditionally discharge the subject or suspend the proceedings for no more than 90 days so the

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[8] § 83-1024.

[9] *Id.*

[10] §§ 83-1027 and 83-1028.

[11] § 83-1028.

[12] § 83-1029.

[13] § 83-1035.

[14] § 83-1036.

[15] *Id.*

subject could undergo voluntary treatment.[16] But if the board concluded that "neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty [were] available," the board was required to enter an order providing for treatment of the subject.[17]

We conclude that Gallegos was not committed within the meaning of the MHCA. While Gallegos was initially hospitalized under an MHB order, the MHB never made any finding that Gallegos was a mentally ill dangerous person. Nor did the MHB ever find that "neither voluntary hospitalization nor other alternatives less restrictive of his . . . liberty than a mental-health-board-ordered treatment disposition" were necessary.[18] Instead, the MHB granted Gallegos' request that he be allowed to undergo voluntary treatment and eventually dismissed the petition filed against him.

Our conclusion that Gallegos was not committed is consistent with the exclusions contained in the definition of "committed to a mental institution" as set forth in § 478.11 of the Code of Federal Regulations. That definition notes that a "formal" commitment is required. As we noted above, Gallegos was not committed within the meaning of Nebraska law. No hearing was held, there was no finding that Gallegos was a mentally ill dangerous person, and Gallegos was not ordered by the MHB to undergo any treatment.

To the extent that Gallegos' 3-day hospitalization prior to his request to undergo voluntary hospitalization could be considered a "commitment," such was also unaccompanied by any hearing or finding that Gallegos was a mentally ill dangerous person. Thus, we conclude that it also was not a "formal" commitment as required by § 478.11.

Moreover, § 478.11 excludes from its definition "a person in a mental institution for observation." According to the MHCA, unless an examination had already taken place within the preceding 24 hours, a subject of a mental health petition is to be

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[16] *Id.*

[17] § 83-1037.

[18] See § 83-1035.

examined within 36 hours after he or she is taken into custody, and prior to his or her hearing. In this case, under the MHCA, the purpose of Gallegos' initial 3-day hospitalization could be characterized as observational in nature and, as such, not considered "committed to a mental institution" under the definition set forth in § 478.11.

We conclude that Gallegos was not "committed to a mental institution" within the meaning of § 922(g)(4). As such, the district court erred when it affirmed the decision of the county court upholding the Douglas County sheriff's refusal to issue Gallegos his gun registration. We therefore reverse the decision of the district court affirming the county court's decision and remand the cause to the district court with directions to remand the matter to the county court with directions to approve Gallegos' request for a gun certificate.

CONCLUSION

We conclude that Gallegos was not committed to a mental institution for purposes of § 922(g)(4) and therefore was not prohibited from possessing a firearm. We reverse the decision of the district court and remand the cause to the district court with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

ROBERT E. TAYLOR, APPELLEE, V. LEATHA L. TAYLOR, APPELLEE, AND SHIRLEY J. LITTLE, APPELLANT.

764 N.W.2d 101

Filed April 17, 2009. No. S-08-303.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and when reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
2. **Contracts: Mechanics' Liens.** A construction lien is not valid absent a contract between the parties.
3. **Property: Sales: Mechanics' Liens.** General cleanup activities in preparation for sale of property are inconsistent with the property changes contemplated and required by Neb. Rev. Stat. § 52-130 (Reissue 2004) for a valid construction lien.

4. **Attorney Fees.** Attorney fees and expenses may be recovered in a civil action only when provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
5. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the fee is left to the trial court's discretion, and an appellate court will not disturb its ruling on appeal absent an abuse of discretion.

Appeal from the District Court for Wheeler County: KARIN L. NOAKES, Judge. Affirmed.

Galen E. Stehlik, of Lauritsen, Brownell, Brostrom, Stehlik, Myers & Daugherty, P.C., L.L.O., for appellant.

Forrest F. Peetz, of Peetz Law P.C., L.L.O., for appellee Robert E. Taylor.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

In this partition action, appellee Robert E. Taylor contests the validity of a construction lien. Anticipating a partition sale, the appellant, Shirley J. Little (Shirley), cleaned up the property by removing junk and tree limbs from the premises. Later, she filed a construction lien against the property.

The district court found that lien was invalid under the Nebraska Construction Lien Act (Act).[1] We affirm, because under the Act, Shirley's cleanup activities did not produce a sufficient change in the property's physical condition of the land to support a valid real estate improvement contract.

Robert and Shirley are brother and sister, and they owned undivided one-half interests in property subject to a life estate owned by their mother, appellee Leatha L. Taylor. Leatha became ill and moved out of her home, and all three agreed that they should sell the property. After disagreements arose while attempting to sell the house, Robert brought a partition action. Leatha did not object to the partition. Shirley cross-claimed, alleging that she had, at Leatha's request, cleaned up the property to prepare it for sale. Shirley filed a purported

[1] Neb. Rev. Stat. §§ 52-125 to 52-159 (Reissue 2004).

construction lien for $3,692.46. The referee sold the property, and the court confirmed the sale.

The court determined each party's share: 16.691 percent to Leatha, 41.6545 percent to Shirley, and 41.6545 percent to Robert. The court also awarded Robert $1,636.19 in attorney fees for bringing the partition action.[2] Finding that Shirley's lien was invalid under the Act, the court refused to order payment out of the sale proceeds for Shirley's purported lien.

[1,2] Shirley argues that the trial court erred in (1) finding that her lien was invalid and (2) awarding Robert the entire amount of his attorney fees. Interpreting the Act presents a question of law, and when reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[3] Under the Act, "[a] person who furnishes services or materials pursuant to a real estate improvement contract has a construction lien . . . to secure the payment of his or her contract price."[4] A construction lien is not valid absent a contract between the parties.[5] A real estate improvement contract is

> an agreement to perform services, including labor, or to furnish materials for the purpose of producing a change in the physical condition of land or of a structure including:
>
> (a) Alteration of the surface by excavation, fill, change in grade, or change in a shore, bank, or flood plain of a stream, swamp, or body of water;
>
> (b) Construction or installation on, above, or below the surface of land;
>
> (c) Demolition, repair, remodeling, or removal of a structure previously constructed or installed;
>
> (d) Seeding, sodding, or other landscaping operation;
>
> (e) Surface or subsurface testing, boring, or analyzing; and

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[2] See Neb. Rev. Stat. § 25-21,108 (Reissue 2008).

[3] See *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

[4] § 52-131.

[5] *Tilt-Up Concrete v. Star City/Federal*, 255 Neb. 138, 582 N.W.2d 604 (1998).

> (f) Preparation of plans, surveys, or architectural or engineering plans or drawings for any change in the physical condition of land or structures whether or not used incident to producing a change in physical condition of the real estate.[6]

Under § 52-131, to have a construction lien, Shirley must have had a real estate improvement contract with Leatha. And under § 52-130, to have a valid real estate improvement contract, Shirley's efforts must have produced a change in the physical condition of the land. Shirley claims her lien is for "expenses and time incurred in cleaning up and preparing the house and property to a level of sal[e]ability." According to Shirley, she and her husband spent about 19 days from July to October 2006 cleaning up the property. They cleaned inside the house; they removed items from the yard and other buildings on the property, such as old washers, cars, pieces of iron, tires, lumber, and other garbage; and they removed dead tree branches and other landscaping debris. Shirley claims that these efforts produced a sufficient change in the property's physical condition to qualify as an improvement contract.

Of course, Robert argues that Shirley's cleanup did not result in a physical change in the condition of the land. The district court agreed, holding that the "labor provided by [Shirley] did not produce a change in the physical condition of the land or structure." The court determined that the lien was unenforceable.

We have never determined what activities produce a "change in the physical condition of the land" sufficient to support imposing a construction lien. The Nebraska Court of Appeals has held that a contractor that made repairs to a sewerline could recover on a construction lien.[7] It also has held that a subcontractor could obtain a construction lien for his labor and materials used in framing a house.[8] But here, Shirley made no improvements or alterations to the house.

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[6] § 52-130(1).

[7] *Baumgartner v. Berry*, No. A-03-1208, 2005 WL 1021861 (Neb. App. May 3, 2005) (not designated for permanent publication).

[8] *Sorenson v. Dager*, 8 Neb. App. 729, 601 N.W.2d 564 (1999).

[3] We believe Shirley's activities are inconsistent with the property changes contemplated by § 52-130. Section 52-130 does not define improvements, but does list examples. It speaks to alteration of the surface; demolition, repair, remodeling, or removal of a structure; and seeding, sodding, or other landscaping operations. These changes produce permanent improvements to the real property. Moreover, § 52-130(2) excludes from the definition of real estate improvement contracts activities primarily for the disposal or removal of objects. While cleaning up the yard and removing personal property from buildings may have made the property more appealing to future buyers, it did not produce a permanent improvement in the physical condition of the land sufficient to qualify under the Act. Shirley's purported lien is unenforceable.

[4] Next, we address Robert's attorney fees. A party may recover attorney fees and expenses in a civil action only when provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[9] Section 25-21,108 provides for attorney fees in partition actions as follows:

> [T]he court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of attorney's fees to be awarded, which amount shall be taxed as costs in the proceedings. If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original complaint of the plaintiff, such attorney's fees shall be awarded entirely to the attorney for the plaintiff; otherwise, the court shall order such fees for the attorneys to be divided among such of the attorneys of record in the proceedings as have filed pleadings upon which any of the findings in the judgment of partition are based.

Shirley contends that the district court should not have awarded Robert the entire amount of his attorney fees. She argues that most of the legal work did not involve the partition

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[9] See *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

action, but involved Robert's attempts to nullify the claimed encumbrances. Alternatively, she argues that Robert's pleadings do not reflect the existence of any encumbrances, because it was Shirley who cross-complained for the encumbrance and Robert who denied the existence of the encumbrances in his answer.

Robert claims that he correctly pleaded the shares that the court ultimately confirmed and that the court was correct in awarding his entire attorney fees. He argues that before the court could confirm the sale, it had to address Shirley's construction lien. We agree.

[5] When an attorney fee is authorized, the fee is left to the trial court's discretion, and we will not disturb its ruling on appeal absent an abuse of discretion.[10] For steering the partition action to a confirmed sale, the district court awarded Robert the entire amount of his attorney fees, $1,636.19. We do not find this to be an abuse of discretion.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

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[10] See *id.*

MARY BURNISON, APPELLANT, V.
KATHLEEN JOHNSTON, APPELLEE.
764 N.W.2d 96

Filed April 17, 2009. No. S-08-406.

1. **Actions: Parties: Standing.** Whether a party who commenced an action had standing and was therefore the real party in interest presents a jurisdictional issue.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
3. **Contracts: Assignments: Intent: Public Policy.** A contractual right to the benefit of a promise cannot be assigned if the obligor reasonably intended for the right to be exercised only by the party with whom it contracted. The rule usually applies when a promise involves a relationship of personal trust or confidence or the obligor has expectations of counterperformance. Otherwise, contractual rights are generally assignable unless the terms validly preclude assignment or the assignment is contrary to statute or public policy.

4. **Contracts: Assignments: Intent.** A right to receive money under a contract may be assigned unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned.
5. **Malpractice: Attorney and Client: Public Policy: Claims: Assignments.** Public policy does not prohibit an attorney's assignment of a claim for unpaid legal fees simply because a client might raise malpractice defenses.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions.

William M. Lamson, Jr., and Craig F. Martin, of Lamson, Dugan & Murray, L.L.P., for appellant.

Ronald E. Reagan, of Reagan Law Offices, P.C., L.L.O., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

We are asked to decide whether a law firm can assign its right to collect unpaid legal fees. The law firm assigned its claim to the appellant, Mary Burnison. Burnison filed an action seeking recovery of the fees from the appellee, Kathleen Johnston, and in response, Johnston raised several defenses. After trial, the district court dismissed Burnison's claims because it concluded that she lacked standing to bring the action. The court reasoned that the law firm had impermissibly assigned personal legal services. We reverse, and remand with directions because the law firm did not assign a duty to perform legal services. We further conclude that public policy does not bar assignment of a right to collect unpaid legal fees.

BACKGROUND

Since 1994, the law firm Martin & Martin, P.C., had provided legal services to Johnston and her husband regarding their real estate holdings. In October 2001, the firm assigned to Burnison "all right, title, and interest in any cause of action arising from legal services that MARTIN & MARTIN, P.C. rendered to . . . Johnston[,] at her request from May 1, 1996 through February 25, 1998."

Burnison filed a complaint against Johnston, seeking recovery of unpaid legal fees for services provided by the assignor. She alleged breach of oral contract and quantum meruit theories of recovery. Burnison alleged that (1) the firm had performed legal services for Johnston in 1996 and 1997; (2) she only sporadically paid for some of these services; and (3) despite demand for payment, she owed $76,323 in legal fees and $32,918 in interest.

In her answer, Johnston denied that Burnison was the real party in interest or that any contract existed between her and the firm. Her answer included a litany of affirmative offenses. She alleged that (1) the firm's services were provided for another party; (2) the claims for payment resulted from fraud; and (3) the statute of limitations barred the claims. She admitted that the firm had performed work for her. But she alleged that (1) its legal work violated the law and ethical standards for attorneys; (2) its performance was contrary to the standard of professional care for attorneys in Nebraska; and (3) the firm "fraudulently performed" because the attorneys had advised her to take actions that were illegal and which subjected her to legal liability and loss of property. She also alleged that the firm had fraudulently listed charges and payment on her account to defeat the statute of limitations.

At trial, the parties stipulated that the firm's hourly rate was fair. But Johnston disputed whether the firm provided services for her and whether the services were of any value to her. In addition, she contended that some of the assignor's actions were unethical, which she alleged precluded the assignee's recovery of unpaid legal fees.

In its order, the court concluded that Burnison lacked standing as an assignee to seek recovery of the unpaid legal fees. It ruled that the assignment upon which she relied was an improper attempt to assign personal legal services. It reasoned that the language in the firm's assignment to Burnison was too broad because it assigned a cause of action instead of an unpaid fee.

ASSIGNMENT OF ERROR

Burnison assigns that the district court erred in ruling that a claim for the collection of legal fees is nonassignable.

STANDARD OF REVIEW

[1,2] The court determined that because the firm's claim was nonassignable, Burnison did not have standing in the action. In other words, it determined that she was not the real party in interest.[1] Whether a party who commenced an action had standing and was therefore the real party in interest presents a jurisdictional issue.[2] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[3]

ANALYSIS

Burnison contends that Nebraska law permits an assignment of a claim for unpaid legal fees and that our cases on the nonassignability of malpractice claims are not controlling. She argues that none of the public policy considerations that prohibit the assignment of legal malpractice claims are present when an attorney assigns a claim to collect unpaid legal fees for services already provided. She distinguishes a legal malpractice claim as a tort action resting on the attorney's personal fiduciary duty to provide professional services to a client. She argues that in contrast to a malpractice claim, a claim to collect unpaid legal fees is a contract action that does not involve a duty to provide personal services. In brief, she argues that "the duty to professionally provide legal services is personal; the duty to pay for that service which has already been performed is not."[4]

At the outset, we note that a likely stumbling block here was the failure of our case law to consistently use the proper terminology to discuss the transfer of contractual rights and duties. Unless a party transfers both its rights and its duties under a contract, it is important to distinguish between the assignment of contractual rights and the delegation of

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[1] See *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005).

[2] See *id.*

[3] See *id.*

[4] Brief for appellant at 9 (emphasis omitted).

performance of a duty.[5] Although the court stated that the firm had impermissibly attempted to assign personal legal services, it apparently meant that the firm had impermissibly attempted to delegate performance of its duty to provide legal services.

But this case does not involve delegation of performance of a duty under a contract for personal services. And Johnston admits that the firm did not delegate any obligation to perform legal services for her. We conclude that the district court erred in finding that the firm had attempted to delegate performance of its duty to provide legal services. Here, the firm assigned only its contractual right to receive Johnston's payment for services rendered. But Johnston argues that public policy prohibited the firm's assignment and that we should therefore affirm the court's judgment even if its reasoning was incorrect.[6]

[3] We have held that a contractual right to the benefit of a promise cannot be assigned if the obligor reasonably intended for the right to be exercised only by the party with whom it contracted. The rule usually applies when a promise involves a relationship of personal trust or confidence or the obligor has expectations of counterperformance.[7] Otherwise, contractual rights are generally assignable unless the terms validly preclude assignment or the assignment is contrary to statute or public policy.[8]

[4] In *Peterson v. Hynes*,[9] we affirmed a party's right to assign a claim for unpaid fees under a contract to provide

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[5] See, Restatement (Second) of Contracts §§ 317 and 318 (1981); 3 E. Allan Farnsworth, Farnsworth on Contracts § 11.1 (3d ed. 2004).

[6] See *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[7] See *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978). See, also, 29 Samuel Williston, A Treatise on the Law of Contracts § 74:10 (Richard A. Lord ed., 4th ed. 2003).

[8] See, *Eli's, Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999); *Schupack*, *supra* note 7; *Aronsohn v. Mandara*, 98 N.J. 92, 484 A.2d 675 (1984); *International Collectors v. Mazel Co.*, 48 Wash. App. 712, 740 P.2d 363 (1987). Accord, Restatement, *supra* note 5, § 317; Williston, *supra* note 7.

[9] *Peterson v. Hynes*, 220 Neb. 573, 371 N.W.2d 664 (1985).

personal services. There, the buyers of stock in a bank holding company promised in an addendum to the purchase agreement that they would hire the sellers as consultants and pay them specified fees for a defined period. But the buyers never allowed the sellers to provide consulting services and paid them only a fraction of the promised fees. The sellers assigned their claim to recover the unpaid fees under the agreement. On appeal, the buyers argued that they were not liable because the sellers could not assign their contractual rights. We noted that the sellers had not delegated their obligation to perform consulting services. We held that a right to receive money under a contract may be assigned

> "unless there is something in the terms of the contract manifesting the intention of the parties that it shall not be assigned. This is true of money due or to become due under a contract involving personal skill, service, or confidence; the party who has performed such obligations, or who has contracted to do so, may assign his right to the money earned or which he is to earn, although the contract itself is not assignable."[10]

Johnston acknowledges our holding in *Peterson*. But she contends that the firm's assignment was against public policy. She argues that Burnison must prove the value of the firm's services and its compliance with professional responsibility requirements.[11] Because she has malpractice defenses to the firm's claim for unpaid fees, she argues that the same public policy concerns that prohibit the assignment of attorney malpractice claims apply here. We disagree.

Johnston cites no case holding that such an assignment violates public policy. It is true that an assignee's rights are no greater than the assignor's[12] and that Burnison must prove the value of its services and compliance with professional standards. And it is not uncommon for clients to allege

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[10] *Id.* at 577, 371 N.W.2d at 667, quoting 6 Am. Jur. 2d *Assignments* § 16 (1963). See, also, Restatement, *supra* note 5, § 317, comment *d.*

[11] See *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007).

[12] *Mid-America Appliance Corp. v. Federated Finance Co.*, 172 Neb. 270, 109 N.W.2d 381 (1961).

counterclaims of legal malpractice in response to actions to recover unpaid legal fees.[13] But Johnston's reliance on the public policy reasons for prohibiting the assignment of tort claims for legal malpractice is misplaced. Assignments of malpractice claims are prohibited to avoid undermining the duty of confidentiality and other professional duties that arise from the client-attorney relationship.[14] Those public policy concerns are not present here.

[5] As Burnison points out, we have previously affirmed a money judgment against a firm's former client in an action brought by a bank after the firm assigned all its accounts receivable to the bank as security for a loan.[15] Johnston, however, argues that the defendant did not raise the assignment's validity. But we would have addressed the jurisdictional issue of standing if we had considered the assignment invalid.[16] We conclude that public policy does not prohibit an attorney's assignment of a claim for unpaid legal fees simply because a client might raise malpractice defenses. Johnston's defenses against the assigned claim are not defenses against the assignment itself and did not prevent Burnison from attempting to enforce her interest.[17]

Finally, we reject Johnston's contention that the firm assigned more than a claim to collect unpaid legal fees. Johnston does not identify any other cause of action that would have supported Burnison's claim to recover a money judgment from

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[13] See, e.g., *Manci v. Ball, Koons & Watson*, 995 So. 2d 161 (Ala. 2008); *Wolfe v. Wolf*, 375 Ill. App. 3d 702, 874 N.E.2d 582, 314 Ill. Dec. 486 (2007); *Zabin v. Picciotto*, 73 Mass. App. 141, 896 N.E.2d 937 (2008); *Kutner v. Catterson*, 56 A.D.3d 437, 867 N.Y.S.2d 156 (2008); *Riley v. Montgomery*, 11 Ohio St. 3d 75, 463 N.E.2d 1246 (1984).

[14] See, *North Bend Senior Citizens Home v. Cook*, 261 Neb. 500, 623 N.W.2d 681 (2001); *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994). See, also, *Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257, 885 A.2d 163 (2005); *Kracht v. Perrin, Gartland & Doyle*, 219 Cal. App. 3d 1019, 268 Cal. Rptr. 637 (1990); Annot., 40 A.L.R.4th 685 (1985).

[15] See *Vistar Bank v. Thompson*, 253 Neb. 166, 568 N.W.2d 901 (1997).

[16] See *In re Estate of Chrisp*, 276 Neb. 966, 759 N.W.2d 87 (2009).

[17] See *Vistar Bank, supra* note 15.

Johnston apart from her alleged failure to pay money owed for legal services.[18]

We conclude that the district court erred in concluding that Burnison lacked standing because the firm had impermissibly attempted to delegate personal legal services. We further conclude that public policy does not prohibit an attorney's assignment of a claim for unpaid legal fees when the former client defends with allegations of malpractice. Accordingly, we reverse the judgment of the district court and remand the cause with directions to the district court to make the necessary findings of fact and conclusions of law and decide the remaining issues.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

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[18] See, generally, *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008).

STATE OF NEBRASKA, APPELLEE, V.
PETER M. SINICA, JR., APPELLANT.
764 N.W.2d 111

Filed April 23, 2009. No. S-08-042.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
2. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
5. **Lesser-Included Offenses.** To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.
6. **Homicide: Lesser-Included Offenses: Minors.** Involuntary manslaughter is a lesser-included offense of child abuse resulting in death.

7. **Lesser-Included Offenses: Jury Instructions.** In conducting the first step of the statutory elements approach to determine whether a lesser-included offense instruction should be given, the greater offense should be the offense with which the defendant is charged. Thus, if it would be impossible to commit the charged offense without simultaneously committing the lesser offense, and the evidence produces a rational basis for acquitting the defendant of the former and convicting of the latter, the lesser offense should be included in the step instruction regardless of its relationship to other lesser-included offenses in the instruction.
8. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
9. **Lesser-Included Offenses: Jury Instructions.** Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions.
10. **Lesser-Included Offenses: Jury Instructions: Presumptions: Appeal and Error.** When the trial court in a criminal case provides the jury with a step instruction specifically instructing the jury that if it determined that the State proved each element of the charged offense beyond a reasonable doubt, it should not consider lesser-included offenses, an appellate court presumes that the jury followed the instruction and did not consider any of the purported lesser-included offenses after finding that the defendant was guilty of the charged offense.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew G. Graff for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Peter M. Sinica, Jr., appeals his conviction and sentence following a trial by jury on the charge of intentional child abuse resulting in death. Sinica was sentenced to a term of imprisonment of 20 to 30 years. We affirm the conviction and sentence.

BACKGROUND

Tori Ziana Lee Stone (Tori) died on July 27, 2006. Her father, Sinica, was charged with intentional child abuse resulting in death, a Class IB felony.[1] He entered a plea of not guilty and was tried by a jury. We summarize those proceedings.

Tori was born on May 10, 2006. She was the child of Sinica and Tory Lee Stone, both unmarried Lincoln residents who lived apart and had ended their relationship by the time of Tori's birth. Tori lived with Stone for the first month of her life, but stayed with Sinica at his home for short periods during that time. In mid-June, Stone asked Sinica to keep Tori with him for an indefinite period of time, and he agreed to do so. Shortly thereafter, Sinica initiated proceedings to gain legal custody of the child. The court awarded joint custody of Tori to Sinica and Stone, with each to have physical custody on a rotating basis.

Sinica described Tori as being "fussy" and crying more than usual in July 2006. On July 10, a doctor treated Tori for an inner ear infection. Sinica testified that on that evening, Tori was "fussy" and had "mild vomiting." Sinica testified that on the following day, Tori rolled off his bed and may have hit her head on a rock which was on the floor next to the bed. At some time during this period, Sinica told Stone that Tori had slipped out of his hands and hit her head while he was bathing her. Tori was with Stone during the weekend of July 14 to 17, and then Stone returned her to Sinica's residence. Stone testified that during the weekend, Tori cried more than usual but that Stone did not notice any bruising on the child's head or body.

Sinica testified that Tori was "fussy" and "spitting up" on July 17 and 18, 2006, and that she was vomiting and had diarrhea by July 19. Sinica admitted that out of frustration, he shook the child for "a couple of seconds" on the evening of July 19, but denied that he intended to harm her. On the following day, Sinica took Tori to the doctor because she was still vomiting and had diarrhea. He did not mention that he had shaken her the night before, because he did not think that the shaking had

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[1] See Neb. Rev. Stat. § 28-707 (Reissue 2008).

caused any harm. The doctor suggested admitting Tori to the hospital for observation, but after consulting with his father, Sinica declined. He agreed to watch her carefully and return her to the doctor's office if her symptoms worsened. When Stone came to pick up Tori on July 20 or 21, Sinica told her that Tori was sick and had been to the doctor and that it would not be wise for her to be around Stone's other children. Stone noticed that Tori was crying more than usual. She decided to leave Tori with Sinica, who was then residing with his parents. Sinica testified that Tori's symptoms had subsided by July 23 and that when he took her to the doctor for a followup visit on July 24, he was told that she was "perfectly healthy."

On July 26, 2006, Sinica fed Tori between 6 and 7 p.m. and then put her to bed. He testified that she was still asleep at approximately 10 p.m. and that she continued to sleep when he repositioned her. He next checked her at midnight, and again she did not awaken when he repositioned her head. At approximately 1:30 a.m., he heard crying, so he changed Tori's diaper, gave her a pacifier, and laid her on his bed while he went to the kitchen to prepare a bottle. Sinica testified that when he returned to the bedroom about 10 minutes later, Tori was lying face down on the bed. When he picked her up to give her the bottle, he noticed that she was not breathing normally, her lips were blue, and she was making a gurgling sound. Sinica testified that when he realized Tori was not responding, he became frantic, picked her up, and shook her. He later told police that he shook her hard enough that her head and legs were "flopping back and forth." Sinica testified that he shook the child in an attempt to obtain a response, but with no intent to harm her. When Tori did not respond and Sinica was unsuccessful at reviving her with CPR and chest compressions, he and his father took her to a nearby fire station for medical attention. When they arrived at approximately 2:25 a.m., an emergency medical technician detected a faint pulse but no spontaneous respiration. The technician called for an ambulance and continued his efforts to resuscitate the child until the ambulance arrived and transported her to a Lincoln hospital. She was then transported by "Life Flight" to Children's Hospital in Omaha.

A physician at the pediatric intensive care unit of Children's Hospital noted that when he took over Tori's care at approximately 8 a.m., she "already had signs that she was neurologically devastated." CT scans revealed both old and new head injuries. Tori's condition did not change, and she died that evening. An autopsy performed on the following day revealed extensive bleeding and swelling of her brain. The forensic pathologist who performed the autopsy testified to a reasonable degree of medical certainty that the cause of death was "severe closed head injury or craniocerebral trauma with extensive acute subdural and subarachnoid hemorrhage, a massive acute cerebral edema." The pathologist testified that beyond these fatal injuries, he also found evidence of multiple healed rib fractures, an "old" fracture of a lumbar vertebra, and "corner fractures" of both tibial bones. The pathologist testified that in his opinion, Tori died as a result of homicide caused by intentionally inflicted injuries.

At the instruction conference held at the conclusion of trial, the court proposed a step instruction which permitted the jury to find Sinica either not guilty or guilty of one of the following offenses: (1) intentional child abuse resulting in death, (2) intentional child abuse resulting in serious bodily injury, (3) intentional child abuse, or (4) negligent child abuse. The State objected to the inclusion of negligent child abuse, arguing that it was not supported by the evidence. Sinica's counsel argued that negligent child abuse was a lesser-included offense of intentional child abuse resulting in death and that the evidence provided a rational basis upon which the jury could conclude that Sinica acted negligently. The court overruled the State's objection. Sinica's counsel did not object to any portion of the court's proposed instruction, but requested that it be amended to include the following language:

> 2. Regarding the charge of Manslaughter, the State must prove beyond a reasonable doubt:
>
> a. that Peter Sinica, Jr., caused the death of Tori Stone;
>
> b. that he did so unintentionally;
>
> c. that he did so while in the commission of the unlawful act of Negligent Child Abuse . . . ;

d. that he did so on, about or between July 13, 2006, and July 27, 2006; and

e. that he did so in Lancaster County, Nebraska.

The State objected to this amendment, arguing that manslaughter was not a lesser-included offense of intentional child abuse resulting in death. The court overruled Sinica's proposed amendment and gave the step instruction as originally proposed. The jury was given separate verdict forms for its use in returning a verdict of guilty of one of the four offenses listed in the step instruction or not guilty. After deliberating, the jury returned a verdict of guilty on the charged offense of intentional child abuse resulting in death. After Sinica was convicted and sentenced for that offense, he perfected this timely direct appeal.

ASSIGNMENT OF ERROR

Sinica's sole assignment of error is that the district court erred in failing to instruct on the lesser-included offense of manslaughter.

STANDARD OF REVIEW

[1-3] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.[2] Whether jury instructions given by a trial court are correct is a question of law.[3] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[4]

ANALYSIS

[4,5] This appeal presents the legal issue of whether involuntary manslaughter is a lesser-included offense of intentional child abuse resulting in death. Conceptually, a lesser-included offense is a "device that permits a jury to acquit a defendant of a charged offense and instead to convict of a less serious crime

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[2] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[3] *State v. Draganescu*, *supra* note 2; *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[4] *State v. Draganescu*, *supra* note 2.

that is necessarily committed during the commission of the charged offense."[5] A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[6] To determine whether one statutory offense is a lesser-included offense of the greater, Nebraska courts look to the elements of the crime and not to the facts of the case.[7]

Child abuse offenses are defined by § 28-707. The statute defines multiple offenses ranging in severity from a Class I misdemeanor to a Class IB felony, depending upon the state of mind of the abuser and the result of the abuse.[8] At the time of the offense and trial involved in this case, § 28-707 provided in pertinent part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health;
>
> (b) Cruelly confined or cruelly punished;
>
> . . . .
>
> (3) Child abuse is a Class I misdemeanor if the offense is committed negligently.
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.
>
> (5) Child abuse is a Class III felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in such section.

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[5] Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 Rutgers L.J. 351, 354 (2005).

[6] *State v. Draganescu*, *supra* note 2; *State v. Gresham*, *supra* note 2.

[7] *State v. Draganescu*, *supra* note 2; *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[8] See *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998).

> (6) Child abuse is a Class IB felony if the offense is committed knowingly and intentionally and results in the death of such child.

Sinica was charged with intentional child abuse resulting in death, a Class IB felony under § 28-707(6).

We held in *State v. Parks*[9] that misdemeanor negligent child abuse is a lesser-included offense of felony intentional child abuse, noting that "it is impossible to commit intentional child abuse without also committing negligent child abuse." *Parks* did not involve a death, but in two subsequent cases, *State v. Blair*[10] and *Molina*,[11] we relied upon *Parks* to conclude that negligent child abuse was a lesser-included offense of intentional child abuse resulting in death. Neither of those cases presented the issue of whether the jury should have been instructed on the lesser-included offense of manslaughter.

[6] At the time of the offense and trial in this case, Nebraska's manslaughter statute provided in pertinent part: "(1) A person commits manslaughter if he . . . causes the death of another unintentionally while in the commission of an unlawful act."[12] We have characterized this offense as "involuntary manslaughter."[13] It is a Class III felony.[14] Applying the elements test stated above, we conclude that one cannot commit the greater offense of intentional child abuse resulting in death without simultaneously committing the lesser offense of involuntary manslaughter. The difference between the two lies in the actor's state of mind. If the abuse resulting in death was committed knowingly and intentionally, it is a Class IB felony as defined in § 28-707(6). If the child abuse which results in death is committed negligently, it is the misdemeanor offense defined by § 28-707(3) which constitutes the predicate "unlawful act"

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[9] *Id.* at 948, 573 N.W.2d at 459.

[10] *State v. Blair*, 272 Neb. 951, 726 N.W.2d 185 (2007).

[11] *State v. Molina*, *supra* note 3.

[12] Neb. Rev. Stat. § 28-305 (Reissue 2008).

[13] *State v. Pettit*, 233 Neb. 436, 454, 445 N.W.2d 890, 901 (1989), *overruled on other grounds*, *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994).

[14] § 28-305(2).

for the lesser offense of involuntary manslaughter. Thus, involuntary manslaughter is a lesser-included offense of child abuse resulting in death and the jury should be so instructed if there is a rational basis upon which it could conclude that the defendant committed child abuse negligently, but not knowingly and intentionally.

We recognize tension between our holding today and our analytical approach in *State v. White*.[15] In that case, the defendant was charged with first degree murder and the jury was instructed on lesser-included offenses of second degree murder and manslaughter. The jury convicted the defendant of manslaughter. On appeal, the defendant argued that the trial court erred in denying his request to instruct on additional lesser-included offenses of child abuse and third degree assault. Applying the statutory elements approach, we concluded that it was possible to commit manslaughter without committing child abuse or third degree assault and that therefore, neither was a lesser-included offense of manslaughter.

Our analysis in *White* suggests that a linear application of the statutory elements approach should be undertaken where several offenses are claimed to be lesser-included offenses of the charged offense. In determining whether child abuse and third degree assault were lesser-included offenses in *White*, we did not look to whether their elements were necessarily included in the charged offense of first degree murder. Instead, we compared the elements of child abuse and the elements of third degree assault to those of manslaughter, which was itself a lesser-included offense on which the defendant was ultimately convicted. With respect to the child abuse offense, the result would have been the same under either approach, because it is possible to commit first degree murder *or* manslaughter without committing child abuse. But the linear analysis employed in *White* would prevent a jury from considering alternative lesser-included offenses, i.e., all crimes which constitute lesser-included offenses of the charged offense, regardless of their relationship to each other.

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[15] *State v. White*, 217 Neb. 783, 351 N.W.2d 83 (1984).

Other courts have employed a broader application of the statutory elements approach or a similar analytical device which permits the jury to consider all lesser-included offenses of the charged offense. For example, the rule in Vermont is that "[a] criminal defendant is entitled to have the jury instructed on every offense that is composed solely of some of the same elements as the offense charged and is supported by the evidence."[16] Illinois courts employ a "charging instrument approach" which permits a jury to consider all "less serious offenses that are included in the charged offense,"[17] but not less serious, unrelated offenses which were not charged.[18] In Indiana, the statutory elements of the charged crime are compared with the statutory elements of the lesser offense to determine whether the latter is "inherently included" in the former and is thus a lesser-included offense.[19]

[7] Comparing the elements of a proposed lesser-included offense to those of the offense charged is consistent with the purpose of a lesser-included instruction, which is to give the jury reasonable alternatives to conviction on the charged offense or acquittal, where the evidence supports such alternatives.[20] For example, where a defendant is charged with intentional child abuse resulting in death and there is conflicting evidence as to whether the child abuse was intentional or negligent, a jury which concludes that the child abuse resulted in death should have the option of finding the defendant guilty of the charged offense or the lesser-included offense of manslaughter, based on the predicate unlawful act of negligent child abuse. Likewise, in such a case where there is conflicting evidence as to whether the child abuse caused death, the jury should be permitted to consider the lesser felony and

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[16] *State v. Russo*, 177 Vt. 394, 400, 864 A.2d 655, 661 (2004).

[17] *People v. Ceja*, 204 Ill. 2d 332, 359, 360, 789 N.E.2d 1228, 1246, 273 Ill. Dec. 796, 814 (2003).

[18] *People v. Davis*, 213 Ill. 2d 459, 821 N.E.2d 1154, 290 Ill. Dec. 580 (2004).

[19] *Brown v. State*, 770 N.E.2d 275, 280 (Ind. 2002).

[20] See, *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); *State v. Molina*, *supra* note 3.

misdemeanor child abuse offenses defined by § 28-707(1) and (3) through (5).[21] We therefore hold that in conducting the first step of the statutory elements approach to determine whether a lesser-included offense instruction should be given, the "greater offense" should be the offense with which the defendant is charged. Thus, if it would be impossible to commit the charged offense without simultaneously committing the lesser offense, and the evidence produces a rational basis for acquitting the defendant of the former and convicting of the latter, the lesser offense should be included in the step instruction regardless of its relationship to other lesser-included offenses in the instruction. To the extent that *State v. White*[22] suggests otherwise, it is disapproved.

[8] Based upon the foregoing, we conclude that the district court erred in not instructing the jury on involuntary manslaughter as a lesser-included offense of child abuse resulting in death. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[23]

[9] The step instruction given by the district court could not have been prejudicial to Sinica despite the fact that it did not include manslaughter as a lesser-included offense of intentional child abuse resulting in death. Error in failing to instruct the jury on a lesser-included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to the defendant under other properly given instructions.[24] In *Molina*, we held that the failure to instruct on negligent child abuse as a lesser-included offense of child abuse resulting in death was not prejudicial, because the jury was required by an instruction

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[21] See *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

[22] *State v. White*, *supra* note 15.

[23] *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008); *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[24] *State v. Molina*, *supra* note 3.

on another count to determine whether or not the defendant acted with the intent to kill, and concluded that he did. We reasoned that the "same jury could not have concluded that [the defendant] acted without intent" with respect to the child abuse charge.[25]

[10] This case presents a similar circumstance. The step instruction given by the trial court specifically instructed the jury that if it determined that the State proved each element of intentional child abuse resulting in death beyond a reasonable doubt, it must find Sinica guilty of that offense and proceed no further. When such a step instruction is given, we presume that the jury followed the instruction and did not consider any of the purported lesser-included offenses after finding that the defendant was guilty of the charged offense.[26] Having specifically found that Sinica acted intentionally, we must presume that the same jury could not have found that he acted without intent and committed negligent child abuse, which would have been the predicate act for an involuntary manslaughter instruction.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

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[25] *Id.* at 521, 713 N.W.2d at 442.

[26] See, *State v. Derry*, 248 Neb. 260, 534 N.W.2d 302 (1995); *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986).

OMNI Behavioral Health, a Nebraska corporation, on behalf of itself and all of its clients, et al., appellants, v. Nebraska Foster Care Review Board, an administrative agency of the State of Nebraska, et al., appellees.

764 N.W.2d 398

Filed April 23, 2009. No. S-08-332.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
4. ____: ____. The existence of an interest protected by the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution depends upon whether the person or entity claiming the interest has a legitimate or justifiable expectation of privacy in the place which the government seeks to enter.
5. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.

Appeal from the District Court for Lancaster County: Jeffre Cheuvront, Judge. Affirmed.

William G. Dittrick and Jennifer D. Tricker, of Baird Holm, L.L.P., and Morgan P. Kelly for appellants.

Jon Bruning, Attorney General, and Frederick J. Coffman for appellees.

Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

STEPHAN, J.

A provision of Nebraska's Foster Care Review Act[1] authorizes the State Foster Care Review Board (the State Board) to visit and observe foster care facilities to ascertain whether they are meeting the needs of foster children. OMNI Behavioral Health (OMNI) and David and Wendy Krom operate foster care facilities in Nebraska. They brought this action for declaratory and injunctive relief, contending that warrantless home visits pursuant to the act would violate their constitutional rights, because the State Board has not promulgated rules restricting the time, scope, and manner of such visits. OMNI also alleged that Carolyn K. Stitt, executive director of the State Board, wrongfully interfered with its contractual relationship with the State of Nebraska. OMNI, its president William Reay, and the Kroms (collectively appellants) appeal from an order of the district court for Lancaster County denying the relief sought and entering summary judgment in favor of the State Board, Stitt, and Burrell Williams, a former chairman of the State Board (collectively appellees). We affirm the judgment of the district court.

BACKGROUND

PARTIES

OMNI is a Nebraska nonprofit corporation, and Reay is its president and one of its founders. OMNI operates four "enhanced treatment group homes" in Nebraska which provide therapeutic foster care for children with significant mental disorders and behavioral problems who pose a risk to themselves and others. The group homes are licensed by the State of Nebraska as community mental health centers and foster care providers, and are approved for participation in the Medicaid program. Each group home accommodates approximately 10 children who range in age from 12 to 18. Most, but not all, of the children residing in OMNI's group homes have been placed in the custody of the Nebraska Department of Health and Human Services (DHHS) pursuant to court orders. As to these children, OMNI is compensated either with Medicaid funds or,

[1] See Neb. Rev. Stat. §§ 43-1301 to 43-1318 (Reissue 2008).

where a child does not qualify for Medicaid, through individual contracts with DHHS. Pursuant to a contract with DHHS, OMNI provides initial training, 24-hour support, and ongoing training to licensed foster parents who care for children in their private residences.

The State Board is established pursuant to the Foster Care Review Act and includes 11 members appointed by the Governor with the approval of the Legislature.[2] The State Board is required by statute to establish local foster care review boards for the review of cases of children in foster care placement[3] and to refer such cases to the local boards for review.[4]

The State Board is required by law to establish and maintain a statewide register of all foster care placements occurring within the state based upon reports made by DHHS, courts, and child-placing agencies.[5] The State Board is required to review the activities of local boards and report findings to DHHS, county welfare offices, and courts having authority to make foster care placements.[6] The State Board also has statutory responsibility with respect to permanency planning for children in foster care. It is required to review the case of each child at least once every 6 months and submit to the court having jurisdiction over the child

> its findings and recommendations regarding the efforts and progress made to carry out the plan or permanency plan established pursuant to section 43-1312 together with any other recommendations it chooses to make regarding the child. The findings and recommendations shall include whether there is a need for continued out-of-home placement, whether the current placement is safe and appropriate, the specific reasons for the findings and recommendations, including factors, opinions, and

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[2] § 43-1302(b).

[3] § 43-1304.

[4] § 43-1306.

[5] See § 43-1303(1).

[6] See § 43-1303(2) and (3).

> rationale considered in its review, whether the grounds for termination of parental rights under section 43-292 appear to exist, and the date of the next review by the [S]tate [B]oard or designated local board.[7]

At the center of the dispute in this case is the following provision of the Foster Care Review Act: "The [S]tate [B]oard may visit and observe foster care facilities in order to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met."[8]

Claims

This action involves two distinct claims. First, appellants contend that because the State Board has not promulgated rules and regulations narrowing the scope of its statutory authority to visit and observe foster care facilities, any such visits to appellants' facilities would violate their rights under the 4th and 14th Amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. Second, OMNI alleges that in 2004, Stitt tortiously interfered with its contractual relationship with the State of Nebraska. Appellants sought declaratory and injunctive relief prohibiting the State Board from visiting "any group homes or foster care facilities" until it "promulgates constitutionally acceptable and sufficient rules and regulations surrounding the time, scope and manner of its warrantless searches." Finally, appellants further sought to enjoin appellees from "contacting any law enforcement, judicial, or state and/or federal monetary funding payors, including, but not limited to the Governor of the State of Nebraska and [DHHS], in attempts to defame OMNI and to preclude funding to OMNI or placement of children in OMNI facilities." Appellees denied these claims and asserted several affirmative defenses.

Proceedings in District Court

After conducting an evidentiary hearing, the district court denied appellants' motion for a temporary injunction. Appellees then filed a motion for summary judgment. At a hearing on this

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[7] § 43-1308(1)(b).

[8] § 43-1303(3).

motion, the parties offered and the court received all of the testimony and some of the exhibits received at the hearing on the motion for temporary injunction. This record reflects a long-standing dispute between OMNI and the State Board regarding the scope of the State Board's statutory authority to monitor OMNI's operations. The dispute has generated a 1998 Attorney General's opinion[9] recognizing the State Board's authority under § 43-1303 to conduct both announced and unannounced visits of foster care facilities, including group homes operated by OMNI and others. The dispute has also generated a 2006 letter from the office of Public Counsel (ombudsman) critical of the fact that the State Board has not promulgated rules and regulations addressing the timing, scope, and nature of visits conducted pursuant to § 43-1303. Although the parties' differences are extensive and complicated, the material facts relevant to the issues presented in this appeal are relatively straightforward.

The rules and regulations promulgated by the State Board pursuant to the Administrative Procedure Act[10] include no provisions pertaining to visits conducted pursuant to § 43-1303. A draft version of rules pertaining to this subject was prepared and discussed in 2006 but never adopted by the State Board, for reasons which are unclear from the record. The State Board does have certain written protocols and manuals pertaining to home visits, some of which are available on its Web site, but these have not been adopted as regulations and do not place specific restrictions on home visits.

A representative of the State Board, together with a representative of DHHS acting at the request of the Governor, conducted an unannounced visit to an OMNI group home in 1999. The State Board has not attempted another unannounced visit to an OMNI group home since that time, and OMNI has denied the State Board's requests to conduct announced visits. The State Board has not conducted any unannounced visits to any foster care facilities since 2001.

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[9] Att'y Gen. Op. No. 98029 (July 13, 1998).

[10] Neb. Rev. Stat. §§ 84-902 to 84-909 (Reissue 2008).

The Kroms have been licensed foster care providers since 2000. They have cared for a total of 6 or 7 foster children in their private home and were caring for two foster children at the time of Wendy Krom's testimony in 2007. The Kroms have received training and support from OMNI. In 2005, a representative of the State Board called Wendy Krom to arrange a home visit. OMNI had instructed foster care providers to refuse to allow the State Board to inspect foster care facilities, so the Kroms reported the request to their OMNI specialist. The State Board eventually obtained a court order requiring the Kroms to permit the visit.

The visit was conducted by two representatives of the State Board, and an OMNI specialist was also present. The visitors explained the purpose of their visit and asked the Kroms basic questions about their foster children. They also spoke with the children and gave them gifts. There is no indication in the record that they inspected the Kroms' home. The visit was approximately 20 minutes in duration. Wendy Krom described the visitors as "very polite" and compared the visit to "grandma and grandpa coming over." She later completed a foster home visit evaluation in which she stated that she was impressed with the professionalism and demeanor of the persons who conducted the visit and considered them to be "excellent" representatives of the State Board. However, Wendy Krom testified that she would not feel comfortable denying a future request for a home visit by the State Board due to fear of the foster children's being removed from her home, and she believes that there should be rules governing such visits.

At the time of the 2007 evidentiary hearing in this case, the State Board, in conjunction with its local boards, was conducting 25 or fewer visits of foster care facilities per year. The visits are arranged in advance and last 40 minutes or less. Some are informational visits to group homes and other foster care facilities which are not located in private homes. During such visits, the facility and programs are examined in order to determine whether the foster placement is safe and appropriate, but the foster children residing at the facility are not interviewed or otherwise evaluated. State Board representatives enter only

those areas of a group home or similar facility where permitted by the facility staff. The State Board has never been denied permission to visit any group home or similar facility by any foster care provider other than OMNI.

"Project Permanency" visits are conducted by the State Board at private foster homes to determine that children are safe and their needs are being met. Arrangements for the visit are made in advance with the foster parents. During "Project Permanency" visits, the foster parents are interviewed but the children are not. Representatives of the State Board enter only those rooms to which they are invited by the foster parents. The State Board has not received complaints regarding any "Project Permanency" visit.

Other home visits conducted by the State Board are pursuant to court orders entered in juvenile proceedings. There has been no reported harm to any foster child resulting from a visit by the State Board.

Stitt wrote a letter to the director of DHHS on August 19, 2004, setting forth details of a "consistent pattern of children's safety being endangered in OMNI group homes" and a failure on the part of OMNI to acknowledge and address such problems. Reay disputed these statements in a letter to the State Board dated August 23, 2004. The State Board denies receiving this letter. OMNI's general counsel sent a letter dated September 1, 2004, addressed to Stitt in her individual capacity and as executive director of the State Board, alleging that Stitt's August 19 letter to the director of DHHS was libelous and requesting that Stitt publish "retractions and corrections." The record does not reflect whether Stitt responded to this letter. Reay testified in an April 2007 hearing that none of OMNI's facilities have been closed as a result of any action by the State Board, that its operations in Nebraska have expanded, and that it continues to receive new state contracts.

Based upon this evidence, the district court entered an order on February 28, 2008, granting appellees' motion for summary judgment. The court determined that the visits by the State Board pursuant to § 43-1303 did not constitute "'warrantless administrative searches'" implicating Fourth Amendment

rights, but, rather, were "in furtherance of the responsibility of the state to assure appropriate care and services for children who are in the state's care." The court also determined that this action was an impermissible collateral attack on juvenile court orders requiring that foster care facilities be available for announced as well as unannounced visits by case managers, court-appointed special advocates, guardians ad litem, and the State Board. The court determined that appellants lacked standing to assert any rights on behalf of others. Finally, the court rejected OMNI's claim that the actions of Stitt or the State Board tortiously interfered with OMNI's contractual relationship with the State, reasoning that one state agency cannot interfere with a contract between another state agency and a third party and that there was no prayer for relief for tort damages.

Appellants perfected a timely appeal from the district court's order. We moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[11]

ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in (1) sustaining appellees' motion for summary judgment; (2) finding that the State Board visits do not constitute warrantless administrative searches; (3) applying the "special needs" balancing test to the facts of this case in an improper manner; (4) essentially finding that because of the contract between OMNI and DHHS, the 4th and 14th Amendment rights of OMNI and the children in its care have been extinguished or somehow diminished; (5) finding that appellants are attempting to collaterally challenge the jurisdiction of certain Nebraska juvenile court judges; (6) dismissing the claims against Stitt in her individual capacity; and (7) determining that they do not have standing to bring this action on behalf of the children in their care.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue

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[11] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[12] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[13]

ANALYSIS

Fourth Amendment Claims

[3,4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.[14] These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.[15] While the language of the Fourth Amendment specifically protects the right of a person to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures,[16] the U.S. Supreme Court has held that the protection of the Fourth Amendment is applicable to commercial premises, as well as to private homes.[17] The existence of an interest protected by the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution depends upon whether the person or entity claiming the interest has a legitimate or justifiable expectation of privacy in the place which the government seeks to enter.[18]

In this case, appellants do not seek relief with respect to any specific visit conducted pursuant to § 43-1303(3) in the past.

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[12] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d. 194 (2008).

[13] *Id.*

[14] *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007).

[15] See *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[16] *State v. Sinsel*, 249 Neb. 369, 543 N.W.2d 457 (1996).

[17] *New York v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

[18] See *State v. Lara*, 258 Neb. 996, 607 N.W.2d 487 (2000).

Instead, they seek declaratory and injunctive relief based on the broad assertion that "the current lack of regulations surrounding [State Board] 'visits' violates the 4th and 14th Amendment rights of every individual subject to the [State Board] 'visits.'"[19] We agree with the district court that OMNI and the Kroms have standing to assert this claim only with respect to the premises upon which they provide foster care and that Reay has no legal interest in this case separate from that of OMNI.

Appellants contend that the constitutionality of foster home visits pursuant to § 43-1303 should be determined under the "*Colonnade*/*Biswell* doctrine,"[20] as articulated by the U.S. Supreme Court in *New York v. Burger*.[21] The doctrine is based upon a recognition that because there is a reduced expectation of privacy on the part of an owner of commercial premises in a "'closely regulated'" industry, the warrant and probable cause requirements of traditional Fourth Amendment jurisprudence have lessened application.[22] In *Colonnade Corp. v. United States*,[23] which involved a warrantless inspection of a business which sold liquor pursuant to a federal revenue statute, the court noted that the liquor industry had long been subject to close government supervision and inspection. In *United States v. Biswell*,[24] the Court upheld a warrantless search of a licensed gun dealer's premises pursuant to a federal statute, noting that when the dealer chose to engage in the highly regulated firearms business, he did so with the knowledge that his business would be subject to effective inspection. In *New York v. Burger*, the Court upheld a warrantless inspection of a vehicle-dismantling business, articulating a three-part test for a constitutionally permissible inspection in the context of a "pervasively regulated business":

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[19] Brief for appellants at 13.

[20] See, *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970).

[21] *New York v. Burger*, *supra* note 17.

[22] *Id.*, 482 U.S. at 702.

[23] *Colonnade Corp. v. United States*, *supra* note 20.

[24] *United States v. Biswell*, *supra* note 20.

> First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . .
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provide[e] a constitutionally adequate substitute for a warrant." . . . In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.[25]

Appellants argue that because there are no regulations defining the scope of home visits pursuant to § 43-1303(3) or limiting the discretion of the State Board in conducting such visits, any home visit pursuant to the statute would violate their Fourth Amendment rights under the *Colonnade*/*Biswell* doctrine.

We agree with the district court that the *Colonnade*/*Biswell* doctrine is not the appropriate standard for determining whether home visits by the State Board violate the Fourth Amendment rights of foster care providers. The reasonable expectation of privacy of a person or firm who is paid to provide foster care for children who are wards of the State is far more attenuated, as to the place where such care is provided, than that of a regulated seller of firearms, liquor, or motor vehicle parts. The State, as the legal custodian of such children, has an obligation to see that they are receiving proper care, and foster care providers have an obligation to the children and the State to provide such care. The Legislature has empowered the State Board and its designated local boards with oversight responsibilities regarding foster care placements, including specific authority to conduct home visits. On this record, it is uncertain whether such visits would constitute a search or seizure within the meaning of the Fourth Amendment or article I, § 7, of the Nebraska Constitution. The visit is not for the purpose of law

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[25] *New York v. Burger*, *supra* note 17, 482 U.S. at 702-03.

enforcement, and the record indicates that in the past, the State Board has complied with restrictions on visits imposed by foster care providers.[26]

To the extent constitutional rights may be implicated by home visits to foster care facilities pursuant to § 43-1303(3), we agree with the district court that the visits should be judged under a general standard of reasonableness which courts have applied when "'special [governmental] needs,'" beyond the normal need for law enforcement, justify a departure from the requirements of individualized suspicion, warrants, and probable cause under traditional Fourth Amendment analysis.[27] This standard has been applied in cases involving drug testing of railroad workers involved in accidents,[28] U.S. Customs Service employees seeking promotion to sensitive positions,[29] and high school students participating in sports.[30] It is based upon a recognition that "the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State."[31] In such cases, the Supreme Court has applied a balancing test which weighs the intrusion on an individual's liberty interest against the special governmental need for the intrusion.[32]

In *Wyman v. James*,[33] the U.S. Supreme Court applied this general test of reasonableness to the question of whether a

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[26] See *Wyman v. James*, 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408 (1971).

[27] See, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995); *Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

[28] *Skinner v. Railway Labor Executives' Assn.*, *supra* note 27.

[29] *Treasury Employees v. Von Raab*, *supra* note 27.

[30] *Vernonia School Dist. 47J v. Acton*, *supra* note 27.

[31] *Id.*, 515 U.S. at 654. Accord *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995).

[32] See *Ferguson v. City of Charleston*, 532 U.S. 67, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001).

[33] *Wyman v. James*, *supra* note 26.

recipient of government benefits for her children could refuse a home visit by a caseworker without risking the termination of benefits. After first questioning whether such visit constituted a search in the context of the Fourth Amendment, the Court concluded that even if it did, it was not unreasonable. In reaching this conclusion, the Court considered a number of factors, including the statutory and regulatory prohibition of forcible entry or entry under false pretenses, visitation outside working hours, and "snooping in the home."[34] Other factors considered by the Court included the public interest in the welfare of the child and expenditure of public funds, the giving of advance notice of the visit, the importance of observing the child at the actual place of residence, and the fact that the visit was not conducted by police or uniformed authorities, and was not related to any criminal investigation. In concluding that no issue of "constitutional magnitude" was presented, the Court noted that the parent had the right to refuse the home visit, with the only consequence being the cessation of public assistance.[35]

Here, the State has a special need to visit foster care facilities arising from its obligation to see that children entrusted to its legal custody are receiving proper and appropriate foster care from those who contract to provide such care. Thus, we conclude that any claim that a home visit by the State Board infringes upon Fourth Amendment rights, or corresponding rights under the Nebraska Constitution, must be judged by a standard of reasonableness, taking into consideration all relevant circumstances. Normally, this would be an issue of fact which would preclude summary judgment.[36] However, as we have noted, appellants in this case do not challenge the constitutionality of any specific home visit conducted in the past. Rather, they allege that in the absence of duly promulgated regulations defining the time, place, and scope of home visits,

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[34] *Id.*, 400 U.S. at 321.

[35] *Id.*, 400 U.S. at 324.

[36] See *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

any such visit would necessarily violate their rights even if the "special needs" standard is applied.

We reject this contention. The Foster Care Review Act permits but does not require the State Board to promulgate regulations.[37] The absence of specific regulations governing home visits is one factor that a court could consider in determining whether a specific visit was constitutionally unreasonable, but is not the exclusive or necessarily the dispositive factor. For example, the absence of regulations defining the permissible scope and circumstances of home visits might be entitled to significant weight in determining the reasonableness of an unannounced visit conducted in the middle of the night without logical justification, but considerably less weight in the circumstance where the date, time, and scope of a daytime visit are discussed in advance by the State Board and the foster care provider. In other words, the absence of specific regulations governing home visits may or may not result in a particular visit's being held unreasonable and therefore unconstitutional, depending upon all of the other pertinent facts and circumstances. The fact that OMNI group homes house children with mental disorders and behavioral problems, including some who are not wards of the State, does not alter this analysis. It is simply one of the relevant factors which a court would need to consider in determining whether or not a particular home visit was reasonable.

For these reasons, we conclude that the district court did not err in entering summary judgment with respect to appellants' claims for injunctive relief on constitutional grounds. Because of this disposition, we need not reach appellants' related assignments of error.

Tort Claim

[5] Appellants contend that the district court erred in dismissing their claims against Stitt in her individual capacity. We note that OMNI is the only one of the appellants to have asserted a claim against Stitt individually, alleging that she made various misstatements and mischaracterizations directed

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[37] See § 43-1303(2).

to the Governor "which constitute[ed] an intentional act done for the purpose of causing harm" to OMNI's relationship with the State of Nebraska and that "OMNI suffered damage based upon Stitt's interference" with that relationship. To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[38]

The only specific communication between Stitt and the Governor alleged by OMNI and reflected in the record is her August 19, 2004, letter to the director of DHHS, which bears the notation "cc: Governor Johanns." The letter was written on Stitt's letterhead as executive director of the State Board and signed by her in that capacity. In the opening sentence of the letter, Stitt stated that she was writing at the request of the State Board. In their complaint, appellants alleged that Stitt "at all times relevant hereto, has been the Executive Director of the [State Board], and as such has been and will continue to act 'under color of state law.'" Although OMNI's request for a retraction of statements made in the letter was directed to Stitt "simultaneously in ***both*** [her] individual and in [her] official capacities," this does not support an inference that Stitt ever communicated with the Governor regarding OMNI other than in her official capacity. Although OMNI alleged in the complaint that it "suffered damage based upon Stitt's interference with its relationship with the State of Nebraska," Reay testified that no OMNI facility has been closed as a result of any action of the State Board and that OMNI continues to receive new state contracts. Reay also made a conclusory statement that OMNI's reputation had been harmed, but he did not relate this to any specific conduct on the part of Stitt in her individual

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[38] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

capacity or to OMNI's contractual relationship with the State of Nebraska.

The evidence received in support of the motion for summary judgment shows that Stitt did not, as a matter of law, wrongfully interfere in her individual capacity with any contractual relationship between OMNI and the State of Nebraska, and the district court did not err in entering summary judgment with respect to this claim.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

JON OBERMILLER, APPELLANT, V. PEAK INTEREST, L.L.C., DOING BUSINESS AS PIZZA HUT, AND TIG INSURANCE COMPANY, APPELLEES.

764 N.W.2d 410

Filed April 23, 2009. No. S-08-836.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Limitations of Actions: Appeal and Error.** Determining when the statute of limitations begins under Neb. Rev. Stat. § 48-137 (Reissue 2004) presents a question of law. When reviewing a question of law, an appellate court resolves it independently of the lower court's determination.
3. **Workers' Compensation: Limitations of Actions: Words and Phrases.** Under Neb. Rev. Stat. § 48-137 (Reissue 2004), the "time of the making of the last payment" means the date the employee or the employee's provider receives payment.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Bill Lamson, of Timmermier, Gross & Prentiss, for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

CONNOLLY, J.

SUMMARY

After an employer or its insurer has paid compensation, Neb. Rev. Stat. § 48-137 (Reissue 2004) bars an employee's claim if the employee fails to file suit within 2 years after the last payment. This appeal addresses whether the statute of limitations begins to run when the employer or its provider mails payment or when the employee receives payment. The trial judge determined that the date the employer mails payment starts the statute of limitations and granted summary judgment to the employer. The review panel affirmed. We reverse, and remand with directions because using the date the employee receives payment gives the employee a more definitive date for knowing when the statute of limitations starts.

BACKGROUND

On October 23, 1996, Jon Obermiller sustained an injury while employed with Peak Interest, L.L.C., doing business as Pizza Hut. He alleged that his injury accelerated a preexisting injury to both knees. He filed a compensation claim against Peak Interest and its insurer, TIG Insurance Company (hereinafter collectively Pizza Hut), on February 8, 2005.

In its answer, Pizza Hut alleged that under § 48-137, the statute of limitations barred Obermiller's cause of action. Under § 48-137, when an employer or its insurer has paid compensation, all claims shall be forever barred 2 years from the time of the making of the last payment. Pizza Hut claims that it mailed its last payment on February 7, 2003. Because Obermiller filed his claim on February 8, 2005, Pizza Hut alleged that the statute of limitations barred his claim. Obermiller countered that because his treating physician did not receive the payment

until February 13, 2005, the statute of limitations did not bar his claim.

Thus, the issue presented to the trial judge was whether the starting date for the statute of limitations period began the date Pizza Hut mailed the last payment or the date Obermiller's physician received it. Relying upon *Brown v. Harbor Fin. Mortgage Corp.*,[1] the trial judge found that a certain consistency ought to exist when interpreting "payment" in the workers' compensation statutes. He could discern no reasonable distinction between the making of a last payment by mail under § 48-137 and a payment mailed within 30 days under Neb. Rev. Stat. § 48-125(1) (Reissue 2004). Based upon this reasoning, the trial judge held that February 7, 2003—the day Pizza Hut mailed payment—triggered the running of the statute of limitations. The trial judge thus ruled that the statute of limitations barred Obermiller's claim and granted Pizza Hut summary judgment. The Nebraska Workers' Compensation Court review panel affirmed the decision.

ASSIGNMENTS OF ERROR

Obermiller asserts that (1) the review panel erred in finding that the statute of limitations barred his claim and (2) the review panel erred in affirming the trial judge's granting of summary judgment.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), we may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[2]

[2] Determining when the statute of limitations starts under § 48-137 presents a question of law. When reviewing

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[1] *Brown v. Harbor Fin. Mortgage Corp.*, 267 Neb. 218, 673 N.W.2d 35 (2004).

[2] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

a question of law, we resolve it independently of the lower court's determination.

ANALYSIS

Section 48-137 sets out the statute of limitations for workers' compensation claims:

> In case of personal injury, all claims for compensation shall be forever barred . . . two years after the accident . . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

The workers' compensation statutes do not define "time of the making of the last payment." At the heart of our inquiry is whether this phrase means when compensation is mailed or when it is received. Relying on our decisions in *Brown*, both the trial judge and the review panel concluded that the date of mailing triggers the statute of limitations. We understand why *Brown* may appear to resolve the conflict. We believe, however, this appeal presents a different issue.

In *Brown*, we considered whether an insurance carrier who mailed a check within 30 days of the entry of a compensation award subjected the employer to a 50-percent penalty for delinquent payment. Under § 48-125(1), "fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability or after thirty days from the entry of a final order, award, or judgment of the compensation court." Because the employee received the check 33 days after the entry of the award, she claimed the employer owed her penalty fees. We concluded that the employer mailed compensation within 30 days and was not delinquent.

Pizza Hut claims that under our holding in *Brown*, an employer makes payment when it mails a check, not when the employee receives it. Because § 48-137, like § 48-125, refers to an employer's or insurer's "payment," Pizza Hut argues that we should apply the same rule here. It contends the underlying factual basis of *Brown* concerning the "date of mailing" and "receipt date" mirrors this case. So, Pizza Hut argues that we should construe §§ 48-125 and 48-137 consistently.

But, as Obermiller notes, in *Brown*, we did not conclude that mailing a check equated to making a payment. We held only that § 48-125 does not trigger a penalty for an employer who mails compensation within 30 days of the entry of an award.

Obermiller argues that instead of relying upon *Brown*, we should focus on the definition of "payment." He argues that under that definition, delivery of payment provides the critical event.[3] Obermiller also relies on commercial law and creditor-debtor rules.

Obermiller argues that under these rules, an employer makes a conditional payment when the creditor—in this case, Obermiller—receives payment by a check from the debtor, Pizza Hut.[4] If the check is honored, the condition is removed and payment relates back to the date Obermiller received the check.

The Pennsylvania Supreme Court adopted this position in *Romaine v. W.C.A.B. (Bryn Mawr Nur. Home)*.[5] That court analyzed when the "most recent payment of compensation" occurred under Pennsylvania's workers' compensation statute of limitations.[6] Relying upon the Uniform Commercial Code, the court concluded:

> Five dates in the life of a check are significant, being the date the check is cut, the date it is mailed, the date it is received, the date it is cashed or deposited, and the date upon which it is honored or dishonored. For purposes of the statute of limitations contained in Section 413(a), the only date of import is the date upon which the check is received. That date constitutes the last payment of compensation and, although payment is conditional on that date, the condition is satisfied when the check is honored and payment relates back to the date of its receipt.[7]

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[3] See Black's Law Dictionary 1165 (8th ed. 2004).

[4] See, 60 Am. Jur. 2d *Payment* § 39 (2003); 70 C.J.S. *Payment* § 22 (2005).

[5] *Romaine v. W.C.A.B. (Bryn Mawr Nur. Home)*, 587 Pa. 471, 901 A.2d 477 (2006).

[6] 77 Pa. Cons. Stat. Ann. § 772 (West 2002).

[7] *Romaine, supra* note 5, 587 Pa. at 487-88, 901 A.2d at 486.

In contrast, the Delaware Supreme Court concluded that the date the employer mailed the check triggered the statute of limitations.[8] Similarly to § 48-137, Delaware's statute provides that after compensation has been paid, the statute of limitations bars claims 5 years "from the time of the making of the last payment."[9] But unlike the Pennsylvania Supreme Court, the Delaware Supreme Court in *LeVan v. Independence Mall, Inc.*[10] focused on the meaning of "making" a payment. It concluded that "making" the last payment occurred when the maker of the check caused it to exist. Furthermore, the court reasoned that its interpretation provided the most predictable date for triggering the statute of limitations and was also consistent with using the date of mailing in other contexts under the state's workers' compensation and wage payment statutes.

Other state courts that have determined benefit payments were made on the date of mailing did so in deciding whether to assess late payment penalties[11]; they did not decide the trigger date for the statute of limitations. Whether to assess late payment penalties under § 48-125 was precisely the issue decided in *Brown*. We recognize the benefit of consistency within the workers' compensation statutes; yet, we cannot overlook the fundamental differences between the time limits for payment of benefits under § 48-125 and for filing a claim within the statute of limitations period under § 48-137. The differences lie in which party is penalized for noncompliance with the time limit and the purpose that the date of payment serves under each statute.

It is true that both statutes refer to the date an employer or insurer pays benefits. But § 48-125 imposes penalties when the

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[8] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929 (Del. 2007).

[9] Del. Code Ann. tit. 19, § 2361(b) (2005).

[10] *LeVan*, *supra* note 8.

[11] See, *American Intern. Group v. Carriere*, 2 P.3d 1222 (Alaska 2000); *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229 (Iowa 1996); *Northeast Georgia Health System v. Danner*, 260 Ga. App. 504, 580 S.E.2d 293 (2003); *Audobon Tree Service v. Childress*, 2 Va. App. 35, 341 S.E.2d 211 (1986) (superseded by statute as stated in *Ratliff v. Carter Machinery Co., Inc.*, 39 Va. App. 586, 575 S.E.2d 571 (2003)).

employer fails to pay benefits within 30 days of an award. And the employer or insurer obviously knows the date that the trial judge entered the award. So under § 48-125, the date of mailing rule places compliance with the time limit in control of the party who will be penalized for noncompliance. It allows the employer or insurer to know precisely whether its payment will avoid any penalties.

But the date of mailing rule does not create certainty under the statute of limitations from the claimant's perspective. And under § 48-137, it is the employee, not the employer, who is penalized for failing to comply with the time limit. Thus, the employee has the greatest interest in knowing precisely when the statute will start to run. But unlike the definite trigger date for the employer's time limit under § 48-125, using the date of mailing rule under § 48-137 would create an unsure trigger date for the claimant. The trigger date would remain in the hands of the employer or insurer, and the claimant would often not know precisely when the employer mailed the payment. In contrast, using the date the employee receives payment puts compliance with the time limit in control of the party who will be penalized for noncompliance.

[3] Thus, we disagree with the Workers' Compensation Court that the two statutes lack any legal distinction that would justify using different rules for determining the date that an employer or insurer made a payment of benefits. Because the date of payment serves a different purpose under § 48-137, we conclude that *Brown* does not control. We hold that under § 48-137, the "time of the making of the last payment" means the date the employee or the employee's provider receives payment.

We reverse the review panel's decision and remand the cause to the review panel for remand to the trial judge with directions to reverse the trial judge's order granting summary judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ABRAM L. PAYAN, APPELLANT.

765 N.W.2d 192

Filed May 1, 2009. No. S-08-598.

1. **Constitutional Law: Criminal Law: Jury Trials.** Whether a criminal defendant has been denied a constitutional right to a jury trial presents a question of law.
2. **Judgments: Appeal and Error.** When deciding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Convicted Sex Offender: Statutes: Legislature: Intent.** In enacting Neb. Rev. Stat. § 83-174.03 (Reissue 2008), the Legislature intended to establish an additional form of punishment for some sex offenders.
5. **Convicted Sex Offender: Sentences: Juries.** Where the facts necessary to establish an aggravated offense as defined by the Sex Offender Registration Act are not specifically included in the elements of the offense of which the defendant is convicted, such facts must be specifically found by the jury in order to impose lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2008) as a term of the sentence.
6. **Constitutional Law: Courts: Appeal and Error.** Constitutional error is subject to automatic reversal only in those limited instances where a court has determined that the error is structural.
7. **Courts: Trial: Sentences: Juries: Appeal and Error.** Where a court errs in failing to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt, the appropriate harmless error standard is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.
8. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
9. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
10. ____. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Jon Bruning, Attorney General, J. Kirk Brown, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

After a jury found Abram L. Payan guilty of one count of first degree sexual assault and one count of false imprisonment, the trial judge sentenced him to a term of 18 to 25 years' imprisonment on the sexual assault conviction and 5 to 5 years' imprisonment on the false imprisonment conviction, with the sentences to run concurrently. The trial judge made a finding that the sexual assault conviction constituted an "aggravated offense" as defined by the Sex Offender Registration Act (SORA)[1] and that therefore, Payan was subject to the lifetime registration requirement of SORA and lifetime community supervision pursuant to Neb. Rev. Stat. § 83-174.03 (Reissue 2008) following his release from prison. In this direct appeal, Payan contends that the trial court erred in determining that he had committed an aggravated offense and further erred in imposing an excessive sentence.

I. BACKGROUND

In an amended information filed in the district court for Lancaster County, Payan was charged with first degree sexual assault by a person 19 years of age or older subjecting a person at least 12 years of age but less than 16 years of age to sexual penetration, a Class II felony.[2] He was also charged with first degree false imprisonment by knowingly restraining a person under terrorizing circumstances or under circumstances

[1] See Neb. Rev. Stat. § 29-4001 to 29-4014 (Reissue 2008).

[2] Neb. Rev. Stat. § 28-319(1) and (2) (Reissue 2008).

which exposed the victim to the risk of serious bodily injury, a Class IIIA felony.[3] Payan was tried by a jury.

C.N., whose date of birth is November 14, 1992, testified to events occurring in Lancaster County, Nebraska, on September 8 and 9, 2007. C.N. lived across the street from Payan and was at home on the evening of September 8. She testified that Payan called and asked her to "hang out" with him and several others, including his nephew and another male who were classmates of C.N. Payan said that they would not be gone long and that C.N. would not get in trouble. C.N. decided to join the group. She left her home through a basement window and entered the back seat of Payan's vehicle, where C.N.'s two male classmates were seated. An older individual known as Ason was seated in the front passenger seat.

Payan drove for some distance and then stopped at a store. He and Ason went inside, leaving C.N. and the others in the vehicle. C.N. testified that while Payan and Ason were in the store, she told her classmates that she was frightened because of a prior experience with Payan but that Payan's nephew and the other male assured her they would not let anything happen to her.

When Payan and Ason returned to the vehicle, Payan drove to an unlocked house in Lincoln, Nebraska. After C.N. and the four males entered the front door of the house, Payan and Ason blocked the door by placing a piece of furniture in front of it. C.N. testified that Payan gave her an alcoholic beverage in a shot glass and insisted that she drink it. After initially resisting, she drank several shots, because she did not feel that she had a choice. C.N. testified that she did not feel well after consuming the alcohol and went to a bedroom of the home to lie down. When Payan entered the bedroom, C.N. left the room and rejoined the others, who had remained in the front room of the home. One of C.N.'s classmates testified that while C.N. was in the bedroom, Payan stated that he intended to use his knife to coerce C.N. to perform oral sex.

C.N. testified that when she returned to the front room, Payan, who was also now in the front room, displayed a knife

[3] Neb. Rev. Stat. § 28-314 (Reissue 2008).

and told her he would kill her if she did not comply with his instructions. She testified that Payan then subjected her to oral and anal penetration in the presence of the others in the room. C.N. testified that Payan then took her to the bedroom to perform oral sex on Ason. C.N.'s testimony regarding these events was corroborated by the testimony of one of her male classmates, who stated that he was present and observed the events described by C.N. in her testimony.

All five persons then left the house. C.N. testified that Payan dropped her off in front of his home and told her not to call the police. Instead of entering her home, C.N. walked to a friend's house, arriving after 1 a.m. on September 9, 2007. She told her friend what had occurred. He and another friend drove her to her home at approximately 7 a.m. on September 9.

Payan testified in his own defense. He was born on August 5, 1984, and was 23 years old in September 2007. He testified that he was acquainted with C.N., but denied that he had engaged in sexual acts with her. Payan's 15-year-old nephew also testified for the defense. He denied that he was present at the time of the alleged assault and testified that he had never seen Payan engage in sex with C.N.

After the jury returned guilty verdicts on both charges, the district court ordered a presentence investigation report and subsequently conducted a sentencing hearing. At that hearing, Payan's counsel objected to any finding that the sexual assault conviction constituted an aggravated offense under SORA. He argued that the elements of the offense did not meet the statutory definition of an aggravated offense and that any factual finding by the court would violate the constitutional principles articulated by the U.S. Supreme Court in *Apprendi v. New Jersey*.[4] The district court made a specific finding that Payan's conviction on the sexual assault charge constituted an aggravated offense triggering the lifetime registration requirement under SORA and lifetime community supervision. At the sentencing hearing, Payan signed documents acknowledging that he had been advised of these requirements. Payan was

[4] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

sentenced to a term of 18 to 25 years' imprisonment on the sexual assault conviction and 5 to 5 years' imprisonment on the false imprisonment conviction, with the sentences to run concurrently.

Payan perfected this timely appeal, and both parties filed petitions to bypass, which we granted.

II. ASSIGNMENTS OF ERROR

Payan assigns that (1) the court erred in finding that he is subject to lifetime sex offender registration, (2) the court erred in finding that he is subject to lifetime supervision by the Office of Parole Administration, and (3) his sentence on the sexual assault conviction was excessive.

III. STANDARD OF REVIEW

[1,2] Whether a criminal defendant has been denied a constitutional right to a jury trial presents a question of law.[5] When deciding questions of law, an appellate court is obligated to reach conclusions independent of those reached by the trial court.[6]

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.[7]

IV. ANALYSIS

1. Aggravated Offense Finding

SORA applies to any person who pleads guilty to or is found guilty of certain listed offenses, including sexual assault as defined by § 28-319 or Neb. Rev. Stat. § 28-320 (Reissue 2008).[8] SORA includes a general requirement that persons convicted of these listed offenses must register with the sheriff of the county in which he or she resides[9] during any period of supervised release, probation, or parole and "for a period of

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[5] *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007).

[6] *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[7] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[8] § 29-4003(1)(a)(iii).

[9] § 29-4004(1).

ten years after the date of discharge from probation, parole, or supervised release or release from incarceration, whichever date is most recent."[10]

Certain sex offenders, however, are subject to a lifetime registration requirement. Section 29-4005(2) provides:

> A person required to register under section 29-4003 shall be required to register under [SORA] for the rest of his or her life if the offense creating the obligation to register is an aggravated offense, if the person has a prior conviction for a registrable offense, or if the person is required to register as a sex offender for the rest of his or her life under the laws of another state, territory, commonwealth, or other jurisdiction of the United States. A sentencing court shall make that fact part of the sentencing order.

The lifetime community supervision provisions of § 83-174.03 incorporate and mirror the lifetime registration provisions of SORA.[11] According to § 83-174.03(1), a defendant who commits an aggravated offense as defined by SORA "shall, upon completion of his or her term of incarceration or release from civil commitment, be supervised in the community by the Office of Parole Administration for the remainder of his or her life."

SORA defines an aggravated offense as "any registrable offense under section 29-4003 which involves the penetration of (i) a victim age twelve years or more through the use of force or the threat of serious violence or (ii) a victim under the age of twelve years."[12] Payan argues that he was not convicted of an aggravated offense as defined by SORA, because the elements of first degree sexual assault as charged in the amended information did not include either the use of force or the threat of serious violence or a victim under the age of 12 years. We recently rejected a similar contention in *State v. Hamilton*,[13]

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[10] § 29-4005(1).

[11] *State v. Hamilton, ante* p. 593, 763 N.W.2d 731 (2009); *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[12] § 29-4005(4)(a).

[13] *State v. Hamilton, supra* note 11.

concluding that under SORA, a sentencing judge need not consider only the elements of an offense in determining whether an aggravated offense as defined in § 29-4005(4)(a) has been committed. Instead, the court may make this determination based upon information contained in the record. Payan's argument that the aggravated offense determination under SORA must be based solely upon the elements of the charged offense is without merit.

2. *Apprendi*/*Blakely* Argument

Alternatively, Payan argues that any factual finding of an aggravated offense must be made by a jury. This issue was neither raised nor addressed in *Hamilton*. Payan's argument relies upon the principle established by *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[14] This principle is based upon the Due Process Clause of the 5th Amendment and the jury trial guarantees of the 6th Amendment, as made applicable to the states by the 14th Amendment.[15] *Apprendi* involved a state statute which permitted a judge to impose an extended term of imprisonment if the judge found by a preponderance of the evidence that in committing the crime, the defendant acted with the purpose of intimidation based upon race, color, gender, handicap, religion, sexual orientation, or ethnicity. Concluding that such a finding would be constitutionally impermissible, the U.S. Supreme Court reasoned that the legislature could not "'remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'"[16] Subsequently, in *Blakely v. Washington*,[17] the Court held that "the 'statutory maximum'

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[14] *Apprendi v. New Jersey*, *supra* note 4, 530 U.S. at 490.

[15] *Apprendi v. New Jersey*, *supra* note 4.

[16] *Id.*, 530 U.S. at 490, quoting *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) (Stevens, J., concurring).

[17] *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (emphasis in original).

for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

In applying the *Apprendi*/*Blakely* principle to the issues in this case, we must consider whether the aggravated offense finding made by the sentencing judge subjected Payan to punishment which could be imposed on the basis of the jury verdict alone.[18] Because Payan's sentence of imprisonment for the sexual assault conviction is within the 1- to 50-year statutory range for a Class II felony,[19] the narrower question is whether the lifetime registration requirement under SORA and the lifetime community supervision requirement under § 83-174.03 constitute punishment.

(a) Lifetime Registration

We have previously addressed the question of whether SORA registration requirements are punitive in the context of an ex post facto challenge. In *State v. Worm*,[20] the defendant argued that the lifetime registration requirement under SORA was punitive in nature and therefore in violation of the ex post facto clause as applied to him. We analyzed this issue under the "intent-effects" test established by the U.S. Supreme Court which requires an initial determination of whether the Legislature intended the statute to be criminal or civil.[21] If a court determines that the Legislature intended a statutory scheme to be civil, that intent will be rejected "'"only where a party challenging the [statute] provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention."'"[22] In *Worm*, we first concluded that in enacting SORA, the "Legislature intended to create a civil regulatory scheme to protect the public from the danger posed by sex offenders, which intent is not altered by

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[18] See *id.*

[19] Neb. Rev. Stat. § 28-105 (Reissue 2008).

[20] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[21] See *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

[22] *State v. Worm, supra* note 20, 268 Neb. at 82, 680 N.W.2d at 160, quoting *State v. Isham*, 261 Neb. 690, 625 N.W.2d 511 (2001).

the statute's structure or design."[23] We then examined the factors set out by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*[24] to determine whether the effect of the statute was so punitive as to negate the Legislature's intent. These factors include:

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of *scienter*'; (4) 'whether its operation will promote the traditional aims of punishment—retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.'"[25]

We concluded in *Worm* that SORA's offense categories and registration periods were reasonably related to the danger of recidivism and consistent with SORA's regulatory objective of assisting law enforcement in future efforts to investigate and resolve sex offenses. We concluded that the registration provisions had not been shown to be so punitive in either purpose or effect as to negate the Legislature's intention to create a civil regulatory scheme. We wrote, "Because the registration provisions are not punitive, we defer to the Legislature's determination of what remedial action is necessary to achieve the Legislature's goals."[26]

The intent-effects test utilized in *Worm* to determine whether a statute was civil or punitive for purposes of ex post facto analysis has also been applied to make this determination in a double jeopardy context.[27] But previously, in *State v.*

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[23] *Id.* at 84, 680 N.W.2d at 161.

[24] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

[25] *State v. Isham*, *supra* note 22, 261 Neb. at 695, 625 N.W.2d at 515-16 (2001), quoting *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

[26] *State v. Worm*, *supra* note 20, 268 Neb. at 88, 680 N.W.2d at 163.

[27] See, *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998).

Schneider,[28] we declined to employ the intent-effects test to determine whether a court was required to advise a defendant of the SORA registration requirements before accepting a no contest plea. Instead, following the holdings of other state courts, we concluded that a court is not required to inform a defendant of the "collateral consequence of the duties imposed under [SORA] before accepting his pleas."[29]

Because *Apprendi*/*Blakely* focuses upon whether a defendant is subjected to *punishment* beyond that which is permissible on the basis of the jury verdict alone, we conclude that the intent-effects test is the appropriate standard to determine whether the lifetime registration requirement under SORA and the lifetime community supervision requirement under § 83-174.03 are punitive in nature. If they are not, there can be no *Apprendi*/*Blakely* error. Based upon our holding in *Worm* that the registration provisions of SORA are not punitive, the trial judge's finding of an aggravating offense triggering the lifetime reporting provisions did not violate the constitutional principles articulated in *Apprendi* and *Blakely*.

(b) Lifetime Community Supervision

The same finding of an aggravated offense also triggers the lifetime community supervision provisions of § 83-174.03. We have not previously determined whether those provisions are civil or penal in nature. We do so now, considering first whether the Legislature intended the statute to be civil or punitive in nature.

Section 83-174.03 will pass the intent prong of the intent-effects test if the Legislature intended it to be a part of a civil regulatory scheme to remedy a present situation and the restriction to the individual comes about as a relevant incident to the regulation.[30] Whether the Legislature intended the statute to be civil or criminal is primarily a matter of statutory construction. However, we must also look at the statute's structure and

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[28] *State v. Schneider*, 263 Neb. 318, 640 N.W.2d 8 (2002).

[29] *Id.* at 324, 640 N.W.2d at 13.

[30] See, *State v. Worm*, *supra* note 20; *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235 (3d Cir. 1996).

design.[31] Although § 83-174.03 incorporates the aggravated offense finding from SORA as one of the events which may trigger the lifetime community supervision requirement, it is not actually a part of SORA. The text of § 83-174.03 originated in L.B. 1199,[32] a 2006 "comprehensive bill that amend[ed] several provisions of law with respect to sex offenses and convicted sex offenders."[33] L.B. 1199 created new sex offenses, amended SORA, and mandated lifetime community supervision for certain sex offenders. According to the Judiciary Committee's summary:

> L.B. 1199 provides for lifetime supervision after release from prison or civil commitment for repeat sex offenders and first time offenders convicted of rape of a child under twelve years of age or forcible rape of a person over twelve years of age. Supervision shall be provided by the office of parole administration. Each individual subject to supervision shall be evaluated by [the] office of parole administration and have conditions of supervision imposed which are the least restrictive conditions that are compatible with public safety.[34]

A key factor in determining the legislative intent of § 83-174.03 is the fact that the statute requires persons subjected to lifetime community supervision to be supervised by the Office of Parole Administration, a component of the Department of Correctional Services, which is responsible for all parole services in the community.[35] Section 83-174.03 is codified in chapter 83, article 1(f), of the Nebraska Revised Statutes pertaining to "Correctional Services, Parole, and Pardons." The term "parole" has a distinctively penal connotation. It is generally defined as "[t]he release of a prisoner

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[31] *State v. Worm*, *supra* note 20. See, also, *State v. Isham*, *supra* note 22.

[32] 2006 Neb. Laws, L.B. 1199, § 89.

[33] Introducer's Statement of Intent, Judiciary Committee, 99th Leg., 2d Sess. (Feb. 16, 2006).

[34] Bill Summary, Judiciary Committee, 99th Leg., 2d Sess. (Feb. 16, 2006).

[35] See Neb. Rev. Stat. § 83-1,100 (Reissue 2008).

from imprisonment before the full sentence has been served."[36] In a case holding that a suspicionless search of a parolee did not violate the Fourth Amendment, the U.S. Supreme Court referred to parole as "'an established variation on imprisonment of convicted criminals'" and to parolees as being "on the 'continuum' of state-imposed punishments."[37] Nebraska law defines "[p]arole term" as "the time from release on parole to the completion of the maximum term, reduced by good time."[38]

Unlike the SORA registration requirements, § 83-174.03 subjects the offender who has completed a prison sentence to significant affirmative restraints which may be imposed by the Office of Parole Administration. Some of these are similar to restrictions which may be imposed upon incarcerated persons paroled before their mandatory release date.[39] These include restrictions on place of residence[40]; required reporting to a parole officer[41]; and submission to medical, psychological, psychiatric, or other treatment.[42] In addition, persons subject to lifetime community supervision may be subject to drug and alcohol testing, restrictions on employment and leisure activities, and polygraph examinations.[43]

A majority of the courts which have considered lifetime community supervision statutes similar to § 83-174.03 have concluded that they are punitive in nature, reasoning that "post-release supervision increases the maximum range of an offender's sentence, thereby directly and immediately affecting

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[36] Black's Law Dictionary 1149 (8th ed. 2004).

[37] *Samson v. California*, 547 U.S. 843, 850, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006), quoting *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), and *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).

[38] Neb. Rev. Stat. § 83-170(11) (Reissue 2008).

[39] See Neb. Rev. Stat. § 83-1,116 (Reissue 2008).

[40] §§ 83-174.03(4)(d) and 83-1,116(1)(e).

[41] §§ 83-174.03(4)(c) and 83-1,116(1)(d).

[42] §§ 83-174.03(4)(f) and 83-1,116(1)(f).

[43] § 83-174.03(4)(a), (b), and (f).

the defendant's punishment."[44] The State has called our attention to one case holding otherwise, an unpublished opinion of the Court of Criminal Appeals of Tennessee in which the majority of a divided panel concluded that lifetime community supervision did not constitute punishment, because it was motivated by protective and rehabilitative aims.[45] A dissenting judge agreed with the majority of courts holding that a lifetime community supervision requirement imposed at the time of sentencing was punitive in nature.[46]

[4] We likewise agree with the majority view on this issue. Lifetime community supervision under § 83-174.03 begins upon completion of the offender's term of incarceration or release from civil commitment. It involves affirmative restraints and disabilities similar to and arguably greater than traditional parole. It is not dependent upon any finding that the offender poses a risk to the safety of others at the time he or she completes a period of incarceration or civil commitment. We therefore conclude that the legislative intent in enacting § 83-174.03 was to establish an additional form of punishment for some sex offenders.

[5] In this case, the imposition of lifetime community supervision was triggered by the finding of the trial judge, not the jury, that Payan had committed an aggravated offense as defined by SORA. This constitutes error under *Apprendi* and *Blakely*, because the punishment imposed on the basis of this finding is beyond that which would have been permissible on the basis of the jury verdict alone, i.e., imprisonment for a maximum of 50 years. We hold that where the facts necessary to establish an aggravated offense as defined by SORA are not specifically included in the elements of the offense of

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[44] *Palmer v. State*, 118 Nev. 823, 828-29, 59 P.3d 1192, 1195 (2002). See, *State v. Jamgochian*, 363 N.J. Super. 220, 832 A.2d 360 (2003); *State v. Baugh*, No. 06-1599, 2008 WL 782742 (Iowa App. Mar. 26, 2008) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 752 N.W.2d 34 (Iowa App. 2008)).

[45] *Ward v. State*, No. W2007-01632-CCA-R3-PC, 2009 WL 113236 (Tenn. Crim. App. Jan. 14, 2009).

[46] *Id*. (Tipton, Presiding Judge, dissenting).

which the defendant is convicted, such facts must be specifically found by the jury in order to impose lifetime community supervision under § 83-174.03 as a term of the sentence. We specifically note that the finding of an aggravated offense need not be made by a jury if utilized only to impose the nonpunitive lifetime registration requirements of SORA.[47]

(c) Harmless Error Analysis

[6] The U.S. Supreme Court has recognized that most constitutional error can be harmless.[48] Constitutional error is subject to automatic reversal only in those limited instances where the Court has determined that the error is "'structural.'"[49] In *Washington v. Recuenco*,[50] the Court held that an *Apprendi*/*Blakely* error in failing to submit a sentencing factor to the jury was not structural error and was subject to harmless error analysis. We therefore consider whether the error in this case was harmless.

[7] In performing a harmless error analysis, our normal inquiry is whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[51] But that standard does not logically fit the circumstance presented here, where the error was a failure to require the jury to decide a factual question pertaining only to the enhancement of the sentence, not to the determination of guilt. We hold that the appropriate harmless error standard in this circumstance is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the existence of the sentencing enhancement factor.[52]

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[47] *State v. Hamilton*, *supra* note 11.

[48] *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

[49] *Id.*, 527 U.S. at 8.

[50] *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

[51] See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[52] See, *Neder v. United States*, *supra* note 48; *Galindez v. State*, 955 So. 2d 517 (Fla. 2007); *Adams v. State*, 336 Mont. 63, 153 P.3d 601 (2007); *State v. Bowen*, 220 Or. App. 380, 185 P.3d 1129 (2008).

The jury found Payan guilty of a sex offense which included penetration as an element. Because C.N. was over the age of 12, the crime could be an aggravated offense only if it was committed "through the use of force or the threat of serious violence."[53] The jury heard two distinct versions of the facts. C.N. and one eyewitness testified that the assault occurred after Payan displayed a knife and threatened to kill C.N. if she did not submit to his sexual advances. Payan and one other witness testified that the assault never occurred. There is no evidence that the assault occurred under circumstances which did not involve the use of force or the threat of serious violence. On this record, any rational jury which convicted Payan of the sexual assault would have also concluded that it was committed through the use of force or the threat of serious violence. Accordingly, we conclude that the making of this finding by the trial judge instead of the jury was harmless error.

3. Excessive Sentence Argument

[8] Payan argues that his sentence of imprisonment for 18 to 25 years on his sexual assault conviction was excessive. Payan was convicted of a Class II felony punishable by imprisonment for a minimum of 1 year and a maximum of 50 years.[54] Because Payan's sentence falls within the statutory range, we may alter it only if we conclude that it constituted an abuse of judicial discretion.[55] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[56]

[9,10] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the

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[53] § 29-4005(4)(a)(i).

[54] §§ 28-105 and 28-319(1) and (2).

[55] See *State v. Draganescu*, *supra* note 7.

[56] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[57] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[58]

Payan was 23 years old at the time of the assault. He dropped out of high school but later obtained his diploma through the GED program while at the Work Ethic Camp after a probation violation. He has two young children, one living in Lincoln and the other in Las Vegas, Nevada. He has assaulted the mothers of both children. He pled guilty to second degree kidnapping and battery constituting domestic violence against the mother of his youngest child in 2006 in Las Vegas. He was sentenced to 6 months in jail with the sentence suspended, and he was required to attend domestic violence counseling. Payan assaulted the mother of his oldest child in 2004, when she attempted to end their relationship. He spent 10 days in jail for that assault.

In 2004, Payan pled guilty to an amended charge of attempted robbery, for which he was sentenced to 90 days in jail and 4 years' probation. The probation was extended to 5 years after a violation, and Payan was placed on intensive supervision probation and committed to Work Ethic Camp. According to the presentence investigation report, during the robbery, Payan placed a knife at the victim's throat and demanded money for his next methamphetamine "'fix.'"

Payan reported alcohol abuse and drug use, specifically, near daily use of marijuana from the age of 12 until 2005 and weekly methamphetamine use for a period of 2 years ending in 2004. Tests administered as a part of the presentence investigation report assessed Payan as being at very high risk in categories measuring alcohol abuse, drug abuse or

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[57] *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008).

[58] *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

relapse, violence, antisocial behavior, aggressiveness, and poor stress coping.

We need not reiterate the egregious facts upon which his current sexual assault conviction is based. Taking into account all relevant factors, we conclude that the district court did not abuse its discretion in sentencing Payan.

V. CONCLUSION

In summary, we conclude that the finding that Payan committed an aggravated offense was properly made by the trial judge for purposes of the lifetime registration provisions of SORA, which are civil in nature, but the question should have been submitted to the jury for the purpose of lifetime community supervision pursuant to § 83-174.03, which is punitive. We conclude, however, that this error was harmless and does not require reversal. We further conclude that Payan's sentence was not excessive, and we affirm the judgment of the district court in all respects.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

JAMES E. RISOR, APPELLEE, V.
NEBRASKA BOILER, APPELLANT.
765 N.W.2d 170

Filed May 1, 2009. No. S-08-726.

1. **Workers' Compensation: Appeal and Error.** When reviewing a compensation award under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without power or exceeded its powers; (2) the judgment, order, or award was procured by fraud; (3) the record lacks sufficient competent evidence to warrant the making of the order, judgment, or award; or (4) the compensation court's factual findings do not support the order or award.
2. ____: ____. On appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court independently decides questions of law.

4. **Workers' Compensation.** Under Nebraska's workers' compensation statutes, the law compensates a worker only for injuries resulting from an accident or occupational disease.
5. **Workers' Compensation: Words and Phrases.** The compensability of a condition resulting from the cumulative effects of work-related trauma should be tested under the statutory definition of accident.
6. **Workers' Compensation.** For scheduled disabilities under Neb. Rev. Stat. § 48-121(3) (Reissue 2004), a worker is compensated for his or her loss of use of a body member; loss of earning power is immaterial in determining compensation under § 48-121(3).
7. **Workers' Compensation: Words and Phrases.** A worker's noise-induced hearing loss is a condition resulting from the cumulative effects of work-related trauma, tested under the statutory definition of accident.
8. **Workers' Compensation: Proof.** Under Neb. Rev. Stat. § 48-151(2) (Reissue 2004), an injured worker must satisfy three elements to prove an injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.
9. **Workers' Compensation: Time: Proof: Words and Phrases.** Under Neb. Rev. Stat. § 48-151(2) (Reissue 2004), "suddenly and violently" does not mean instantaneously and with force; instead, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. The time of an accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point.
10. **Workers' Compensation: Time: Proof.** An employee establishes an identifiable point in time when a repetitive trauma injury occurs if the employee stops work and seeks medical treatment.
11. **Workers' Compensation: Time.** The date of an accident resulting in a compensable injury is a question of fact, which the trial judge resolves.
12. **Workers' Compensation: Proof.** To recover under the Nebraska Workers' Compensation Act, a claimant must prove by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.
13. **Judgments: Appeal and Error.** When testing the trial judge's findings of fact, an appellate court considers the evidence in the light most favorable to the successful party and gives the successful party the benefit of every inference reasonably deducible from the evidence.
14. **Trial: Witnesses.** As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony.
15. ____: ____. When a witness makes contradictory statements, the resolution of that contradiction presents a question of fact.
16. **Workers' Compensation: Time.** An employee's claim for injury resulting from an accident is not compensable until the employee discontinues work, even if for a brief time, and seeks medical treatment.

17. ____: ____. A job transfer can constitute a discontinuance of work that establishes the date of injury.
18. **Workers' Compensation: Rules of Evidence.** Under Neb. Rev. Stat. § 48-168 (Cum. Supp. 2008), the Nebraska Workers' Compensation Court is not bound by formal rules of procedure.
19. **Workers' Compensation: Words and Phrases.** Except for scheduled disabilities, disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function.
20. **Workers' Compensation: Time.** In gradual injury cases, the date of injury serves to mark the point in time when the injury rises to the level of disability.
21. **Workers' Compensation: Legislature: Intent.** The Legislature intended to fix benefits for loss of specific body members under Neb. Rev. Stat. § 48-121(3) (Reissue 2004) without regard to the worker's ability to continue working in a particular occupation or industry.
22. **Workers' Compensation.** A worker is entitled to compensation for a scheduled disability even if he or she continues to work. Conversely, a worker is not entitled to an award for loss of earning power when the injury is limited to specific body members, unless some unusual or extraordinary condition as to other members or parts of the body develops as the result of injury.
23. **Workers' Compensation: Time.** For scheduled disabilities caused by repetitive trauma, the date disability begins is the same as the date of injury for whole body impairments caused by repetitive trauma.
24. **Workers' Compensation: Notice.** Under Neb. Rev. Stat. § 48-133 (Reissue 2004), an employer's notice or knowledge of a worker's injury is sufficient if a reasonable person would conclude that the injury is potentially compensable and that the employer should therefore investigate the matter further.
25. ____: ____. When an employer's foreman, supervisor, or superintendent has knowledge of the employee's injury, that knowledge is imputed to the employer.
26. ____: ____. Knowledge imputed to an employer can satisfy the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004).
27. ____: ____. An employee is not required to give an opinion as to the cause of an injury in order to satisfy the notice requirement of Neb. Rev. Stat. § 48-133 (Reissue 2004).
28. ____: ____. When the parties do not dispute the facts concerning reporting and notice, whether such facts constitute sufficient notice to the employer under Neb. Rev. Stat. § 48-133 (Reissue 2004) presents a question of law.
29. ____: ____. Under Neb. Rev. Stat. § 48-144.04 (Reissue 2004), the employer has sufficient knowledge of an employee's injury if a reasonable person would conclude that an employee's injury is potentially compensable and that the employer should therefore investigate the matter further.
30. **Appeal and Error.** Under the law-of-the-case doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication.

Appeal from the Workers' Compensation Court. Affirmed.

Paul Prentiss and Bill Lamson, of Timmermier, Gross & Prentiss, and John Burns, of Burns Law Firm, for appellant.

Martin V. Linscott, of Linscott Law Office, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

Nebraska Boiler appeals from a review panel's decision of the Workers' Compensation Court. The review panel affirmed the trial judge's order that the appellee, James E. Risor, sustained an accident—a noise-induced hearing loss. It reversed, however, that part of the trial judge's order that determined compensation began on Risor's retirement date. The review panel concluded that the appropriate date for commencing payments was the first date that Risor discontinued work for treatment, instead of the date that he retired and stopped working altogether.

This appeal presents several interrelated questions:

1. Is Risor's noise-induced hearing loss an accident caused by repetitive trauma or an occupational disease caused by a condition of employment?

2. What is the injury date for a noise-induced hearing loss and is that date the same as the date disability begins for calculating compensation?

3. Is Nebraska Boiler entitled to a credit for wages paid to Risor, who continued to work after sustaining a scheduled disability?

4. Did the Workers' Compensation Court correctly find that Nebraska Boiler had knowledge of Risor's injury because it had accommodated his hearing loss, which knowledge excused the written notice requirement for claimants?

5. If Nebraska Boiler had sufficient information to warrant further investigation of Risor's potentially compensable injury but failed to file an injury report, was the statute of limitations tolled for Risor's claim?

II. BACKGROUND

Risor began working for Nebraska Boiler in 1973 and did many different jobs in the plant during his 31 years of employment. In manufacturing boilers, Nebraska Boiler's plant generates significant noise levels. In 1988, concerned about his hearing loss, Risor saw a physician at the veterans medical center in Omaha, Nebraska. The records from that examination showed that he had a profound bilateral hearing loss. The records, however, do not mention his work environment as a possible cause of his hearing loss. In June 1993, Risor completed a "Company Care Hearing Questionnaire." By checking affirmative responses, he reported that his hearing was poor and that his hearing had been tested. He double-checked in the space indicating his affirmative response that he had a noisy job. On October 19, Nebraska Boiler referred Risor to a physician for a hearing loss evaluation. The physician wrote a report to Nebraska Boiler's nurse, detailing Risor's severe to profound sensorineural, bilateral hearing loss. The report also stated that Risor had seen two other physicians within the last 10 years.

Risor missed worktime to attend the October 1993 office visit, which was the first time that Risor had missed work because of his hearing loss. Later, Nebraska Boiler evaluated Risor's hearing loss in 1999, 2000, 2002, and 2003.

In January 2004, Risor filed a petition seeking workers' compensation benefits for multiple injuries. Besides his hearing loss, Risor alleged injuries of degenerative arthritis of his shoulders, neck, and knee; carpal tunnel syndrome; and a trigger thumb. On February 12, he retired. Nebraska Boiler filed its first injury report regarding Risor's hearing loss on February 17.

Risor alleged that Nebraska Boiler had notice and knowledge of the accident, which occurred on or about June 25, 2002. Nebraska Boiler answered that Risor had failed to give notice of the injury as soon as practical and that his claim was barred as untimely. In July 2005, another physician reported that Risor had a 100-percent impairment for both

ears and that his employment at Nebraska Boiler was a definitive contributor.

At trial in November 2005, the parties first explained their positions to the trial judge. Risor's attorney could not explain the complaint's date of injury—June 25, 2002—except that it was hard to pinpoint the exact date in repetitive trauma cases. The record shows that Risor's trial attorney was not the attorney who filed Risor's complaint. The record also shows that June 25 was one of the dates on which Nebraska Boiler evaluated Risor's hearing. But Risor's counsel argued that Risor's October 1993 examination was possibly a sufficient interruption in employment to constitute a date of injury and that he would present evidence of the events on that date. So, before trial began, Nebraska Boiler knew that Risor was contending that the examination in October 1993 possibly established a date of injury for his hearing loss.

Risor testified that he began noticing in the mid-1980's that he had hearing problems. He thought it was work related because the noise in the plant was so bad. He stated that everyone in the shop knew about his hearing loss and accommodated him. Although his hearing loss interfered with his work, he could lipread for simple instructions and his supervisor would write him notes. His supervisor stated that Risor's hearing problems did not interfere with his ability to perform his duties.

Risor initially stated that he had not missed any work in 1993 when Nebraska Boiler referred him to a physician for a hearing examination, because he went during his lunch break. On cross-examination, however, he stated that he only had half-hour lunch breaks and that the physician's office was 10 to 15 minutes away from the plant. He said that he had probably missed some work that day but that he believed Nebraska Boiler would have reimbursed him for the missed time.

Regarding his other injuries, Risor testified that some of them had started when he was injured after falling from a scaffolding in 1983. He stated that he had continued working at Nebraska Boiler because he could not get another job with his hearing loss and other physical ailments.

1. Trial Judge's Award

In April 2006, the trial judge entered an award for total and permanent disability, finding that Risor had a 100-percent hearing loss. He determined that the accident date was October 19, 1993, when Risor missed work for the referred office visit. And he calculated Risor's benefits based on his average weekly earnings in 1993. But he ordered the payments for total permanent disability to commence on February 12, 2004, when Risor retired.

The trial judge rejected Nebraska Boiler's argument that it did not have notice of Risor's injury as required by Neb. Rev. Stat. § 48-133 (Reissue 2004). The judge reasoned that Risor's supervisors had accommodated his hearing loss even before 1988. He also rejected Nebraska Boiler's argument that under Neb. Rev. Stat. § 48-137 (Reissue 2004), Risor's claim was time barred. He concluded that an exception to the limitation period applied because Nebraska Boiler had not filed an injury report until 2004.[1]

2. Nebraska Boiler Attempts to Obtain a New Trial so Former Carrier Can Participate

Two attorneys from two different workers' compensation insurers represented Nebraska Boiler for the coverage period from September 1, 1992, to the time of trial. But because the first carrier had misinformed Nebraska Boiler that it was the carrier in 1992, the company's actual carrier for 1992 did not represent Nebraska Boiler at trial. In May 2006, Nebraska Boiler attempted to obtain a new trial so the excluded carrier, Twin City Fire Insurance Company (Twin City), could participate. The trial judge overruled the motion.

Both parties appealed to the review panel. Twin City attempted to intervene so it could request a new trial. The review panel denied intervention. But it stayed adjudication of the parties' appeals while Twin City appealed its denial of intervention. In *Risor v. Nebraska Boiler* (*Risor I*),[2] we affirmed.

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[1] See Neb. Rev. Stat. §§ 48-144.01 and 48-144.04 (Cum. Supp. 2008).

[2] *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008).

3. Review Panel Reverses Starting Date for Compensation

In May 2008, after this court issued its mandate, the review panel issued a decision affirming in part and in part reversing the trial judge's award. In his original appeal to the review panel, Risor had assigned only one error—the trial judge's finding on the injury date. The review panel concluded that the trial judge erred in concluding that total disability benefits were payable to Risor commencing February 12, 2004, when he retired. The panel stated that under Neb. Rev. Stat. § 48-121(3) (Reissue 2004), total loss of hearing in both ears constituted total and permanent disability. Citing *Hobza v. Seedorff Masonry, Inc.*,[3] the review panel modified the award to provide that permanent total indemnity was payable from and after the date of injury—October 19, 1993. Remember, this date was the first time Risor visited the company's physician.

4. Review Panel Affirms Determination of Accident

In its cross-appeal to the review panel, Nebraska Boiler assigned that the trial judge erred in determining that Risor's hearing loss was caused by an accident instead of an occupational disease. The review panel recognized that a split of authority existed on the hearing loss issue, but it concluded that the trial judge did not err in evaluating Risor's hearing loss as an accident. Citing *Dawes v. Wittrock Sandblasting & Painting*,[4] it stated that compensation for repetitive trauma injuries should be tested under the statutory definition of an accident. It also noted that the statutory definition of an occupational disease requires a disease to be "'peculiar to a particular trade.'"[5] It concluded that applying this requirement "is difficult because

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[3] *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

[4] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

[5] See Neb. Rev. Stat. § 48-151(3) (Reissue 2004).

a wide variety of trades expose workers to repetitive high noise levels."

5. Review Panel Affirms Date of Injury

The review panel determined that the trial judge was not clearly wrong in finding that the injury date was October 19, 1993. It held that October 19 was the date when the injury first caused Risor to interrupt or discontinue work. The panel reasoned that although Risor could physically perform his work after 1993, his supervisors and coworkers had accommodated his hearing loss through writing notes, using hand signals, and mouthing words for Risor to lipread.

6. Review Panel Affirms Determination That Nebraska Boiler Had Notice of Risor's Hearing Loss

The panel agreed with the trial judge that Nebraska Boiler had notice of a potentially compensable claim, which should have caused it to investigate further. It noted three relevant facts: (1) The employer had taken precautions to prevent the noise level at its workplace from causing hearing loss; (2) its nurse had referred Risor to a hearing specialist in 1993; and (3) it knew the results of his evaluation.

7. Review Panel Affirms Determination That Risor's Claim Was Not Time Barred

The review panel rejected Nebraska Boiler's argument that the exception under § 48-144.04 to the time limit for filing a claim did not apply because Risor had notified the company of his claim shortly before his retirement. It concluded that notice or knowledge under § 48-144.04 was satisfied by the same notice or knowledge that satisfies § 48-133.

III. ASSIGNMENTS OF ERROR

Nebraska Boiler assigns that the review panel erred in these determinations: (1) Risor's hearing loss fell within the statutory definition of an accident instead of an occupational disease; (2) the date of Risor's accident was October 19, 1993; (3) Risor gave timely notice of his injury; (4) Risor's claim was not barred by the statute of limitations; (5) the company's compensation payments for total permanent disability commenced on

October 19, 1993, with no credit for wages paid to Risor until retirement; and (6) Twin City could not intervene postjudgment as a party of interest.

IV. STANDARD OF REVIEW

[1-3] When reviewing a compensation award under Neb. Rev. Stat. § 48-185 (Reissue 2004), we may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without power or exceeded its powers; (2) the judgment, order, or award was procured by fraud; (3) the record lacks sufficient competent evidence to warrant the making of the order, judgment, or award; or (4) the compensation court's factual findings do not support the order or award.[6] And on appellate review of a workers' compensation award, the trial judge's factual findings have the effect of a jury verdict and will not be disturbed unless clearly wrong.[7] Statutory interpretation, however, presents a question of law, and we independently decide questions of law.[8]

V. ANALYSIS

1. Noise-Induced Hearing Loss Is a Repetitive Trauma Injury

[4] Nebraska Boiler first contends that the review panel should have analyzed hearing loss under the statutory definition of an occupational disease. Under Nebraska's workers' compensation statutes, the law compensates a worker only for injuries resulting from an accident or occupational disease.[9] Nebraska Boiler wishes to characterize Risor's injury as an occupational disease because it argues that under that framework, Risor did not become disabled until February 12, 2004, his retirement date. Obviously, this later date would reduce Risor's award. It contends that Risor's hearing loss

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[6] *Lagemann v. Nebraska Methodist Hosp.*, *ante* p. 335, 762 N.W.2d 51 (2009).

[7] *Id.*

[8] *Id.*

[9] See Neb. Rev. Stat. § 48-101 (Reissue 2004).

was an occupational disease because the unusually noisy environment of its plant was unique to this trade and even to its plant.

Section 48-151(3) defines occupation disease. It means "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and excludes all ordinary diseases of life to which the general public is exposed." Nebraska Boiler relies on two 1960 cases dealing with workers' claims of occupational disease injuries.

In *Riggs v. Gooch Milling & Elevator Co.*,[10] the plaintiff's employment exposed him to unusual amounts of wheat dust, which exposure was peculiar to and characteristic of grain elevator operations. The medical evidence sufficiently supported his claim that his long period of exposure caused his emphysema and secondary conditions. In the other case, *Ritter v. Hawkeye-Security Ins. Co.*,[11] the employee, a dishwasher, developed contact dermatitis because of his exposure to detergents and cleansing chemicals. The use of these chemicals was characteristic of and peculiar to the occupation of dishwashing, which involved a hazard which was greater than the risks in employment generally.[12] We have also dealt with other exposures to workplace substances that resulted in occupational diseases, including exposure to latex,[13] silica,[14] and asbestos particles.[15]

[5] But in contrast to substance exposure cases, we have declined to analyze repetitive trauma cases as occupational

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[10] *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961).

[11] *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 135 N.W.2d 470 (1965).

[12] See, also, *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995).

[13] *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004) (per curiam); *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003).

[14] *Hauff v. Kimball*, 163 Neb. 55, 77 N.W.2d 683 (1956).

[15] *Osteen v. A.C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981).

diseases.[16] We have recognized on several occasions that repetitive trauma cases have characteristics of both an accident and an occupational disease. Yet we have consistently held that the compensability of a condition resulting from the cumulative effects of work-related trauma should be tested under the statutory definition of accident.[17]

Nebraska Boiler argues that occupational hearing loss is distinguishable from repetitive trauma injuries. It contends that unlike repetitive trauma injuries, an occupational disease does not involve an employee's job duties or physical actions. As examples, it cites repetitive trauma injuries resulting from "continuous heavy lifting or repetitive use of power tools."[18] It is true that repetitive trauma injuries usually involve employees' own physical movements in performing their duties. But as Nebraska Boiler's examples illustrate, the trauma on the employee's body is often inseparable from the external objects that the employee must operate, lift, or otherwise manipulate to perform his or her job. Thus, repetitive trauma injuries frequently also involve an external source of physical stress.

Moreover, under the workers' compensation statutes, "injury," meaning injury caused by accident or occupational disease, is defined as "violence to the physical structure of the body."[19] This definition is obviously broad enough to include external sources of trauma to the body, such as loud noise, that are unrelated to the employee's physical movements. For example, we have upheld a disability award for a highway maintenance worker's snow blindness after he plowed snow for 12 hours. His "condition of disability came about, either

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[16] See, *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004); *Dawes*, *supra* note 4.

[17] See, e.g., *Veatch*, *supra* note 16; *Dawes*, *supra* note 4; *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001); *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999). See, also, *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004).

[18] Brief for appellant at 13.

[19] § 48-151(4).

directly or indirectly, as a result of exposure to the sun's rays" as reflected off the snow.[20]

Similarly, many courts have assumed or specifically held that noise-induced hearing loss is an accident.[21] Some of these courts have explicitly reasoned that extremely loud noises produce an external traumatic force on the ears, which is traceable to the resulting hearing loss.[22]

Additionally, we do not believe that noise exposure is a condition of employment peculiar to Risor's employment.[23] Under the definition of occupational disease, "the unique condition of the employment must result in a hazard which distinguishes it in character from employment generally."[24] We agree with the review panel that the range of workers exposed to loud noises is too broad to satisfy this requirement. Many workers' environments expose them to sounds capable of producing hearing loss. To name but a few, these workers include firefighters,[25] police officers,[26] construction

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[20] See *Hayes v. McMullen*, 128 Neb. 432, 434, 259 N.W. 165, 167 (1935).

[21] See, *Powers v. City of Fayetteville*, 97 Ark. App. 251, 248 S.W.3d 516 (2007); *Dorsey v. United Tech./Norden Systems*, 47 Conn. App. 810, 707 A.2d 744 (1998); *Food Machinery Corp. v. Shook*, 425 So. 2d 163 (Fla. App. 1983); *Shipman v. Employers Mutual &c. Ins. Co.*, 105 Ga. App. 487, 125 S.E.2d 72 (1962); *Indiana State Police Dept. v. Carich*, 680 N.E.2d 4 (Ind. App. 1997); *Winkelman v. Boeing Airplane Co.*, 166 Kan. 503, 203 P.2d 171 (1949); *Manalapan Mining Co., Inc. v. Lunsford*, 204 S.W.3d 601 (Ky. 2006); *Romero v. Otis Intern.*, 343 So. 2d 405 (La. App. 1977); *Cisneros v. Molycorp, Inc.*, 107 N.M. 788, 765 P.2d 761 (N.M. App. 1988); *Peabody v. Galion Corp. v. Workman*, 643 P.2d 312 (Okla. 1982); *Hinkle v. H. J. Heinz Company*, 462 Pa. 111, 337 A.2d 907 (1975); *Schurlknight v. City of North Charleston*, 352 S.C. 175, 574 S.E.2d 194 (2002); *Ferrell v. Cigna Property & Cas. Ins. Co.*, 33 S.W.3d 731 (Tenn. 2000).

[22] See, e.g., *Food Machinery Corp.*, *supra* note 21; *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Romero*, *supra* note 21; *Hinkle*, *supra* note 21.

[23] See § 48-151(3).

[24] *Jordan*, *supra* note 17, 258 Neb. at 387, 603 N.W.2d at 417. See *Miller v. Goodyear Tire & Rubber Co.*, 239 Neb. 1014, 480 N.W.2d 162 (1992).

[25] *Schurlknight*, *supra* note 21.

[26] *City of Scranton v. W.C.A.B. (Roche)*, 909 A.2d 485 (Pa. Commw. 2006).

workers,[27] railroad workers,[28] road workers,[29] airport workers,[30] mechanics,[31] machinists,[32] miners,[33] and factory workers.[34] So we conclude that Risor's exposure to loud noises did not create a hazard that distinguished it in character from a myriad of other occupations.[35]

Finally, in its reply brief, Nebraska Boiler argues that hearing loss cannot satisfy the statutory definition of an accident. It contends that sustaining a hearing loss was not "an unexpected or unforeseen injury" at its plant.[36] The "unexpected or unforeseen" element of the definition is satisfied if the cause was of an accidental character or the effect was unexpected or unforeseen.[37] Nebraska Boiler points out that it required its employees to wear hearing protection because the noise was a danger to their health. So it argues that Risor's hearing loss was not unexpected or unforeseen.

Nebraska Boiler's argument gets lost in a legal cul-de-sac. It argues that the hearing loss danger was obvious to any employee because of the noise level, so it could not be unexpected or unforeseen. Conversely, it denies knowing that Risor's hearing loss could have resulted from the noise level in its plant. We conclude that Nebraska Boiler's employees were entitled to rely on the hearing protection that the company provided them to protect them from injury. Risor testified that

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[27] *Romero*, *supra* note 21.

[28] *Ashby v. Long Island Rail Road Co.*, 7 A.D.3d 651, 777 N.Y.S.2d 177 (2004).

[29] *Muscatine County v. Morrison*, 409 N.W.2d 685 (Iowa 1987).

[30] *Shipman*, *supra* note 21.

[31] *OCT Equipment, Inc. v. Ferrell*, 114 P.3d 479 (Okla. Civ. App. 2005).

[32] *Elliott Turbomachinery Co. v. W.C.A.B. (Sandy)*, 898 A.2d 640 (Pa. Commw. 2006).

[33] *Myers v. State Workmen's Comp. Com'r*, 160 W. Va. 766, 239 S.E.2d 124 (1977).

[34] *Hinkle*, *supra* note 21.

[35] See *Dorsey*, *supra* note 21.

[36] See § 48-151(2).

[37] See *Jordan*, *supra* note 17.

wearing hearing protection was always mandatory and that he always complied with this rule at work.

We recognize that some courts have analyzed loud noises as a condition of employment leading to an occupational disease.[38] And some states have statutes setting out standards and rules for occupational hearing loss claims.[39] Among these statutes, some specifically classify noise-induced hearing loss as an occupational disease.[40]

One reason these states enacted separate statutes dealing with hearing loss was to protect workers' compensation insurers from the unexpected rising tide of industrial-related hearing impairments beginning in the late 1940's.[41] Allowing hearing loss benefits as a scheduled disability, without requiring loss of wages, troubled some states. These states were concerned that claimants could potentially receive disability benefits while continuing to work.[42] Thus, some states now require a period of

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[38] See, *Van Voorhis v. Workmen's Comp. Appeals Bd.*, 37 Cal. App. 3d 81, 112 Cal. Rptr. 208 (1974); *Martinez v. Industrial Commission*, 40 Colo. App. 485, 580 P.2d 36 (1978); *Alexander v. Harcon, Inc.*, 133 Idaho 785, 992 P.2d 780 (2000); *Michales v Morton Salt*, 450 Mich. 479, 538 N.W.2d 11 (1995); *Ahlberg v. SAIF*, 199 Or. App. 271, 111 P.3d 778 (2005); *Westmoreland Coal Co. v. Campbell*, 7 Va. App. 217, 372 S.E.2d 411 (1988); *Myers*, *supra* note 33; *Lumbermens Mut. Cas. Co. v. Perkins*, No. 09-98-131 CV, 2000 WL 84889 (Tex. App. Jan. 27, 2000) (not designated for publication).

[39] See, Ala. Code § 25-5-110 (2007); 820 Ill. Comp. Stat. Ann. § 305/8(e)(16) (LexisNexis Cum. Supp. 2008); Iowa Code Ann. §§ 85B.1 to 85B.15 (West 1996 & Cum. Supp. 2009); Md. Code Ann., Lab. & Empl. § 9-505 (LexisNexis 2008); Mo. Ann. Stat. §§ 287.067 and 287.197 (West Cum. Supp. 2008); N.J. Stat. Ann. §§ 34:15-35:10 to 34:15-35.22 (West 2000); N.Y. Workers' Comp. Law §§ 49-aa to 49-hh (McKinney 2005); N.C. Gen. Stat. § 97-53(13) and (28) (LexisNexis 2007); 77 Pa. Cons. Stat. Ann. § 513(8)(i) (West 2002); R.I. Gen. Laws § 28-33-19(a)(4) (2003); Wis. Stat. Ann. § 102.555 (West 2004).

[40] See, Ala. Code § 25-5-110; 820 Ill. Comp. Stat. Ann. § 305/8(e)(16); N.C. Gen. Stat. § 97-53(28); R.I. Gen. Laws § 28-33-19(a)(4).

[41] See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 52.05 (2008).

[42] See *id.*, citing *Fleming v. Industrial Com.*, 95 Ill. 2d 329, 447 N.E.2d 819, 69 Ill. Dec. 384 (1983).

separation from the noise before a claim is compensable.[43] Yet, some of these statutes do more than protect the workers' compensation insurer from claims that possibly involve extended indemnity. They also preserve the employee's claim by providing that the statute of limitations does not commence until the end of employment or the separation period.[44] Other statutes provide that the statute of limitations does not commence until the date of disability[45] or until the date of the last trauma or hazardous exposure.[46]

Obviously, occupational hearing loss raises unique issues regarding accrual dates and limitation periods. As noted, Nebraska Boiler wishes to characterize Risor's injury as an occupational disease. Under an occupational disease framework, it argues that Risor's hearing loss did not disable him until he sustained a labor market access loss. It further argues that because Risor continued to receive wages, he did not sustain a labor market access loss until he retired in February 2004.

We recognize that a labor market access loss is the test of disability in occupational disease cases, at least when the disease results in a whole body injury.[47] In accident cases involving whole body impairment, we also test a claim of disability for a loss of employability and earning capacity rather than a loss of bodily function.[48] But these rules do not apply when accidents or occupational diseases result in scheduled disabilities, which include hearing loss.[49]

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[43] See, e.g., Mo. Ann. Stat. § 287.197(7); N.J. Stat. Ann. § 34:15-35:20; N.Y. Workers' Comp. Law § 49-bb; Wis. Stat. Ann. § 102.555(7).

[44] See, e.g., Iowa Code Ann. § 85B.8; Mo. Ann. Stat. § 287.197(7); N.J. Stat. Ann. § 34:15-35:20; N.Y. Workers' Comp. Law § 49-bb; Wis. Stat. Ann. § 102.555(4).

[45] See, e.g., Ind. Code Ann. § 22-3-7-32 (LexisNexis Cum. Supp. 2008); Mo. Ann. Stat. § 287.063 (Cum. Supp. 2008).

[46] See, Ark. Code Ann. § 11-9-702(2)(A) (Supp. 2007); Okla. Stat. Ann. tit. 85, § 43 (West 2006); 77 Pa. Cons. Stat. Ann. § 513(8)(viii).

[47] See *Ludwick, supra* note 13.

[48] See *id.*

[49] See § 48-121(3).

[6] For scheduled disabilities under § 48-121(3), a worker is compensated for his or her loss of use of a body member; loss of earning power is immaterial in determining compensation under § 48-121(3).[50] And despite the obvious potential for extended indemnity periods in gradual injury cases, the Nebraska Legislature has not enacted separate accrual dates or limitation periods for these types of claims. So insurers' indemnity concerns cannot be the basis of our decision. The Legislature intended the Nebraska Workers' Compensation Act to provide benefits for employees injured on the job.[51] Applying the act consistently with that legislative goal is our only concern here.

[7] We are persuaded by the reasoning of those courts holding that noise-induced hearing loss is caused by repetitive external trauma produced in the work environment. We also believe that an occupational disease classification is inappropriate under our case law. Occupational hearing loss does not result from exposure to a workplace substance. And noise exposure is too common to be considered a condition peculiar to Risor's occupation or Nebraska Boiler's industry. We conclude that a worker's noise-induced hearing loss is a condition resulting from the cumulative effects of work-related trauma, so we test Risor's claim under the statutory definition of accident.

2. Date of Injury for Repetitive Trauma Injuries

Nebraska Boiler contends that even if Risor's hearing was an accident under the workers' compensation statute, the review panel erred in affirming the trial judge's finding that the date of injury was October 19, 1993.

[8] The Nebraska Workers' Compensation Act defines an accident as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and

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[50] See, *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005), citing *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001); *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991); *Sopher v. Nebraska P. P. Dist.*, 191 Neb. 402, 215 N.W.2d 92 (1974).

[51] *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007).

producing at the time objective symptoms of an injury."[52] Under § 48-151(2), an injured worker must satisfy three elements to prove an injury is the result of an accident: (1) The injury must be unexpected or unforeseen, (2) the accident must happen suddenly and violently, and (3) the accident must produce at the time objective symptoms of injury.[53]

We have already addressed Nebraska Boiler's argument regarding an unexpected or unforeseen injury, and it does not argue that Risor failed to show objective symptoms of injury. Therefore, we focus on the second element.

[9] Under § 48-151(2), "suddenly and violently" does not mean instantaneously and with force; instead, the element is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.[54] The time of an accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point.[55]

[10] An employee establishes an identifiable point in time when a repetitive trauma injury occurs if the employee stops work and seeks medical treatment.[56] The law does not establish a minimum time that an employee must discontinue work for medical treatment to be eligible for benefits.[57] The length of time is not the controlling factor.[58]

Nebraska Boiler does not dispute these rules. Instead, it contends that Risor failed to produce "substantial evidence" that he missed work on October 19, 1993, to seek medical treatment.[59] It contends that he contradicted himself on whether he had missed work. Alternatively, it argues that Risor's injury occurred sometime in the 1980's, when Nebraska Boiler

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[52] § 48-151(2).

[53] See *Swoboda, supra* note 17.

[54] See *id.* (discussing rationales).

[55] See *id.*

[56] See *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001).

[57] *Id.*

[58] *Id.*

[59] Brief for appellant at 17.

accommodated him at work for his hearing loss or when he first had his hearing tested in 1988. Finally, it argues that the 1993 date could not be the date of injury because Risor failed to plead this date in his complaint as a possible date of injury.

(a) Evidence Sufficiently Supports Date of Injury

[11,12] The date of an accident resulting in a compensable injury presents a question of fact, which the trial judge resolves.[60] To recover under the Nebraska Workers' Compensation Act, a claimant must prove *by a preponderance of the evidence* that an accident or occupational disease arising out of and occurring in the course of employment proximately caused an injury which resulted in disability compensable under the act.[61]

[13-15] When testing the trial judge's findings of fact, we consider the evidence in the light most favorable to the successful party. We give the successful party the benefit of every inference reasonably deducible from the evidence.[62] As the trier of fact, the trial judge determines the credibility of the witnesses and the weight to give their testimony.[63] And when a witness makes contradictory statements, the resolution of that contradiction presents a question of fact.[64]

We recognize that Risor initially stated that he had not missed work to attend the 1993 referred medical examination. Yet, in context with Risor's other statements, the trial judge could have reasonably concluded that Risor meant he had not lost wages over the appointment. And Risor's testimony on cross-examination showed that he could not have attended the

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[60] See, *Morris*, *supra* note 13; *Mendoza v. Pepsi Cola Bottling Co.*, 8 Neb. App. 778, 603 N.W.2d 156 (1999).

[61] See *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008). See, also, § 48-151(2).

[62] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[63] *Id.*

[64] See, *Hawkes v. Lewis*, 252 Neb. 178, 560 N.W.2d 844 (1997); *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995).

appointment in the half-hour time that Nebraska Boiler allotted him for his lunch break. The trial judge was not clearly wrong in this factual finding.

(b) Risor's 1988 Hearing Examination Was Not the Date of Injury

[16] Nebraska Boiler argues that the trial judge should not have treated Risor's 1988 hearing test any differently than his 1993 test because both tests showed profound hearing loss. The evidence, however, fails to show that Risor had missed work for his hearing examination in 1988. Remember, an employee's claim for injury resulting from an accident is not compensable until the employee discontinues work, even if for a brief time, and seeks medical treatment.[65]

(c) Minor Accommodations Are Not a Job Change

[17] Relying on *Owen v. American Hydraulics*,[66] Nebraska Boiler argues that its attempts to accommodate Risor's hearing loss in the 1980's effected a discontinuance of employment sufficient to prove Risor's accident occurred much earlier. It implicitly argues that his claim is therefore time barred. In *Owen*, we implicitly recognized that a job transfer can constitute a discontinuance of work that establishes the date of injury. We affirmed the trial judge's finding that the claimant's injury occurred when he was transferred to another position requiring less strenuous activity after he was no longer able to perform his duties. Here, however, Nebraska Boiler did not attempt to transfer Risor to a position away from the plant's noise.

(d) The Incorrect Date in Risor's Complaint Did Not Prejudice Nebraska Boiler

Nebraska Boiler contends that the trial judge was clearly wrong in finding that October 19, 1993, was the date of injury because he did not plead it. It argues that it could not have anticipated this date when Risor never stopped working until his retirement. It further argues that if it had known this date

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[65] See *Morris*, *supra* note 13, citing *Vonderschmidt*, *supra* note 56.

[66] *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000).

was in play, it would have conducted further investigation and developed additional facts regarding events in 1993.

The record, however, shows that Nebraska Boiler knew from its own records that October 19, 1993, was a possible date of injury. It had referred Risor to the 1993 hearing examination after Risor had completed a questionnaire in which he responded that he had hearing loss and a noisy job. In addition, Risor's attorney had stated before beginning the trial that he intended to present evidence to show that October 19, 1993, was a possible date of injury. Nebraska Boiler did not request a continuance or object that the evidence was outside the pleadings. It clearly questioned Risor about this appointment and presented evidence regarding the issue.

[18] Under Neb. Rev. Stat. § 48-168 (Cum. Supp. 2008), the Nebraska Workers' Compensation Court is not bound by formal rules of procedure. And even our formal pleading rules do not preclude an implicit amendment of pleadings to conform to the evidence when the parties try the issues by consent.[67] We conclude that Nebraska Boiler was sufficiently advised of the issue it was required to defend against and that it did defend against the 1993 date.[68]

The review panel did not err in affirming the trial judge's finding that Risor's date of injury was October 19, 1993.

3. Workers' Compensation Statutes Do Not Require a Claimant's Award for a Scheduled Disability to Be Reduced by Subsequently Earned Wages

Nebraska Boiler argues that even if October 19, 1993, was Risor's date of injury, the trial judge should have credited it for the wages he continued to earn until his retirement. It does not argue that Risor's award for a scheduled disability constitutes an impermissible double recovery.[69] Instead, it argues that requiring it to pay permanent total disability benefits while

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[67] See Neb. Ct. R. Pldg. § 6-1115(b).

[68] See *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

[69] *Madlock, supra* note 50.

Risor was working and receiving wages is grossly unfair. It notes that a 1999 amendment to Neb. Rev. Stat. § 48-119 (Reissue 2004) now requires compensation to be paid from "'the date *disability* began,'" rather than "the date of injury."[70] And it argues that "disability" means the point when an injury results in loss of earning power, so that Risor was not entitled to benefits until he retired. Thus, it argues that the review panel incorrectly relied on *Hobza v. Seedorff Masonry, Inc*.[71] In *Hobza*, we concluded that compensation benefits were payable from the date of injury under the pre-1999 version of the statute. Nebraska Boiler argues that *Hobza* is no longer controlling.

At the outset, we note that the statutes do not define "disability." It is true that the Legislature amended § 48-119 in 1999. But that amendment is consistent with our decisions implicitly or explicitly equating "date of injury" with the date a disability begins.

[19,20] A worker has not suffered a compensable injury until disability begins.[72] And, as noted, except for scheduled disabilities, "disability is defined in terms of employability and earning capacity rather than in terms of loss of bodily function."[73] In gradual injury cases, the date of injury serves to mark the point in time when the injury rises to the level of disability.[74] But Nebraska Boiler's argument that Risor did not suffer a loss of wages is immaterial to determining compensation for scheduled disabilities under § 48-121(3).

[21,22] The Legislature clearly intended to fix benefits for loss of specific body members under subsection (3) without regard to the worker's ability to continue working in a particular occupation or industry.[75] In other words, a worker's

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[70] Brief for appellant at 21. See 1999 Neb. Laws, L.B. 216.

[71] See *Hobza, supra* note 3.

[72] See *Ludwick, supra* note 13.

[73] *Id.* at 894, 678 N.W.2d at 523.

[74] See, e.g., *Ludwick, supra* note 13; *Williams v. Dobberstein*, 182 Neb. 862, 157 N.W.2d 776 (1968). See, also, 3 Larson & Larson, *supra* note 41.

[75] *Broderson v. Federal Chemical Co.*, 199 Neb. 278, 258 N.W.2d 137 (1977). See, also, cases cited at note 50.

diminished earning power is conclusively presumed for injuries resulting in scheduled disabilities.[76] A worker is entitled to compensation for a scheduled disability even if he or she continues to work.[77] Conversely, a worker is not entitled to an award for loss of earning power when the injury is limited to specific body members, unless some unusual or extraordinary condition as to other members or parts of the body develops as the result of injury.[78]

[23] Nebraska Boiler points to no statute that gives an employer a credit for wages paid to a worker who has suffered a scheduled disability but continues to work. Nor is that argument consistent with our case law. Thus, we conclude that for scheduled disabilities caused by repetitive trauma, the date disability begins is the same as the date of injury for whole body impairments caused by repetitive trauma. That date is when the employee discontinues work and seeks medical treatment, despite being paid wages while he continued to work. The review panel did not err in concluding that Risor was entitled to compensation for his scheduled disability from October 19, 1993, despite being paid wages while he continued to work.

4. Nebraska Boiler Had Knowledge of Risor's Injury

Nebraska Boiler contends that the review panel erred in determining that Risor gave timely notice of his injury under § 48-133. Under that section, a claimant cannot maintain an action for compensation unless he or she has given the employer written notice of the injury "as soon as practicable." But § 48-133 also contains an exception to the written notice requirement: "Want of such written notice shall not be a bar to proceedings under the Nebraska Workers' Compensation Act, if it be shown that the employer had notice or knowledge of the injury." The review panel affirmed the trial judge's factual

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[76] See 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 86.02 (2008).

[77] See *id.* See, also, *Sopher, supra* note 50.

[78] See, e.g., *Rodriguez, supra* note 50; *Fenster v. Clark Bros. Sanitation*, 235 Neb. 336, 455 N.W.2d 169 (1990).

finding that Nebraska Boiler had notice or knew of Risor's hearing loss starting in the 1980's when it accommodated his hearing loss. Nebraska Boiler argues that this conclusion was wrong because Risor did not provide notice that his hearing loss was work related until 2004.

[24-28] Under § 48-133, an employer's notice or knowledge of a worker's injury is sufficient if a reasonable person would conclude that the injury is potentially compensable and that the employer should therefore investigate the matter further.[79] When an employer's foreman, supervisor, or superintendent has knowledge of the employee's injury, that knowledge is imputed to the employer. Knowledge imputed to an employer can satisfy § 48-133's notice requirement.[80] And an employee is not required to give an opinion as to the cause of an injury in order to satisfy the notice requirement of § 48-133.[81] Finally, the parties do not dispute the facts concerning reporting and notice or when Nebraska Boiler accommodated Risor's hearing loss. Thus, whether such facts constitute sufficient notice to the employer under § 48-133 presents a question of law.[82]

In resolving this question of law, we note that the review panel concluded that Nebraska Boiler had notice of a potentially compensable claim, which should have caused it to investigate further. The review panel noted three relevant facts: (1) Nebraska Boiler had taken precautions to prevent the noise level at its workplace from causing hearing loss; (2) its nurse had referred Risor to a hearing specialist in 1993; and (3) it knew the results of Risor's evaluation. The review panel also noted the trial judge's finding that Risor's hearing loss in the 1980's was obvious and that Nebraska Boiler had accommodated it. Nebraska Boiler does not dispute these facts. Thus, the review panel did not err in deciding that Nebraska Boiler had sufficient notice that Risor's hearing loss was potentially work related and compensable.

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[79] See *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995).

[80] See *id.*

[81] See *id.*

[82] See *id.*

5. Risor's Claim Was Not Barred by the Statute of Limitations

The review panel affirmed the trial judge's determination that the exception under § 48-144.04 applied to toll the statute of limitations. Section 48-144.04, in relevant part, provides:

> [W]here an employer, workers' compensation insurer, or risk management pool . . . has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file a report thereof, the limitations in section 48-137 . . . shall not begin to run against the claim of the injured employee . . . until such report shall have been furnished as required by the compensation court.

[29] The review panel further determined that under both §§ 48-144.04 and 48-133, the same test for knowledge applies. That is, under § 48-144.04, the employer has sufficient knowledge of an employee's injury if a reasonable person would conclude that an employee's injury is potentially compensable and that the employer should therefore investigate the matter further. We agree.

For injuries set forth in § 48-144.01, the employer or workers' compensation insurer must file an injury report with the Nebraska Workers' Compensation Court within 10 days of the employer's notice or knowledge of the injury. It would be inconsistent to conclude that an employer had sufficient knowledge of a compensable injury to excuse the claimant's written notice of injury but insufficient knowledge to trigger the employer's duty to file an injury report under § 48-144.01.

The review panel concluded that Nebraska Boiler had sufficient knowledge of Risor's injury at least by 1993 but that it failed to file an injury report as required under § 48-144.01. But Nebraska Boiler argues that § 48-144.01 could not toll the statute of limitations. It contends that the statute of limitations began to run sometime in the 1980's when Risor knew or should have known that he had a claim. It argues Risor knew he had a hearing loss in the 1980's and thought it was work related. Section 48-137 provides: "In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have

agreed upon the compensation . . . or . . . one of the parties shall have filed a petition . . . ."

Nebraska Boiler implicitly argues that we should apply the same discovery rule[83] to an original claim for benefits that we have applied to a claim to modify an award. We have held that the 2-year time limit under § 48-137 also applies to a proceeding to modify an award under Neb. Rev. Stat. § 48-141 (Reissue 2004). In modification cases, we have held that a worker must commence a proceeding within 2 years of the time that the employee knows, or is chargeable with knowledge, that his or her condition has materially changed and there is a substantial increase in disability.

But as explained earlier, a claim for disability resulting from repetitive trauma accrues when the employee discontinues work and seeks medical treatment. So applying a discovery rule against an employee in a repetitive trauma case could result in the claim's being barred before it accrues.[84] Other courts have noted the rule's punitive effect. "Applying the discovery rule to such an injury often works to the prejudice of an employee who discovers symptoms of a repetitive trauma injury but continues to work."[85] And we have stated that "the statutory limitation was not intended to commence until there was a claim on which it could run."[86]

But we acknowledge that there is a tension in our case law. In some cases involving progressive injuries, we have held that the statute of limitations is tolled unless the employee "'*knows* that an injury has occurred and that disability therefrom was due to his employment.'"[87] In contrast, in other cases, we have applied a discovery rule that commences the statute of limitations when the employee knew or should have known that an

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[83] See *Frezell v. Iwersen*, 231 Neb. 365, 436 N.W.2d 194 (1989).

[84] See, e.g., *Miniero v. City of New York*, 15 Misc. 3d 432, 833 N.Y.S.2d 845 (2007).

[85] *Schurlknight*, *supra* note 21, 352 S.C. at 178, 574 S.E.2d at 195.

[86] *Williams*, *supra* note 74, 182 Neb. at 865, 157 N.W.2d at 779.

[87] *Novak v. Triangle Steel Co.*, 197 Neb. 783, 786, 251 N.W.2d 158, 160 (1977) (emphasis supplied). See, also, *Williams*, *supra* note 73.

injury was work related.[88] But we need not resolve this tension here.

Even if we concluded that the noise in the plant was such that Risor should have known his hearing loss was work related, the same conclusion would apply to Nebraska Boiler. We agree with the trial judge that it was obvious to Nebraska Boiler that Risor had substantial hearing loss in the 1980's. We could not conclude that Risor should have known or discovered that his injury was work related without also concluding that Nebraska Boiler could have filed an injury report anytime during that period. We conclude that the review panel did not err in determining that § 48-144.01 tolled the statute of limitations from running against Risor's claim.

6. Our Decision in *Risor I* Is the Law of the Case Regarding Twin City's Intervention

Nebraska Boiler argues that the review panel incorrectly determined that this court had addressed its arguments in *Risor I* regarding Twin City's right to participate in these proceedings.

In *Risor I*, we held that an employer's insurer is not a necessary party in a workers' compensation action brought solely against the employer and that the workers' compensation statutes did not authorize postjudgment intervention. And we rejected Twin City's due process arguments that it was entitled to notice and representation. We declined, however, to decide whether the incorrect date of injury alleged in Risor's pleading presented a due process problem for Nebraska Boiler. We concluded that whether Nebraska Boiler had been denied due process by the alleged deficiency was a subject for the substantive appeal. We stated that Twin City was free to represent Nebraska Boiler on this issue in the substantive appeal but held that it had failed to present a reason for intervention.

[30] Therefore, the only issue *Risor I* left open for the substantive appeal was whether the date of injury alleged in

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[88] *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985); *Ohnmacht v. Peter Kiewit Sons Co.*, 178 Neb. 741, 135 N.W.2d 237 (1965).

Risor's pleading presented a due process violation to Nebraska Boiler. Under the law-of-the-case doctrine, an appellate court's holdings on issues presented to it conclusively settle all matters ruled upon, either expressly or by necessary implication.[89] Nebraska Boiler has not specifically argued it was denied due process. But we have determined that it was not prejudiced by the date of injury pleaded because it had sufficient notice that Risor would seek to prove October 19, 1993, was the date of injury. Thus, the only remaining issue from *Risor I* is resolved against Nebraska Boiler.

VI. CONCLUSION

We conclude that a noise-induced hearing loss is a repetitive trauma injury. Thus, it is an accident under the Nebraska Workers' Compensation Act. The review panel did not err in affirming the trial judge's finding that the date of injury was October 19, 1993. The date of injury is the date disability begins for scheduled disabilities resulting from gradual trauma. Nebraska Boiler was not entitled to a credit for wages it paid to Risor after the date that he sustained a scheduled disability. The review panel did not err in determining that Nebraska Boiler had sufficient notice that Risor's hearing loss was work related and potentially compensable. And, under these facts, the review panel correctly affirmed the trial judge's determination that § 48-144.04 tolled the statute of limitations. Finally, under the law-of-the-case doctrine, the review panel correctly declined to revisit arguments regarding Twin City's participation in this action.

AFFIRMED.

GERRARD, J., participating on briefs.

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[89] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

STATE EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID A. JOHNSON, RESPONDENT.

764 N.W.2d 415

Filed May 1, 2009. No. S-09-296.

Original action. Judgment of disbarment.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, David A. Johnson. The court accepts respondent's surrender of his license and enters an order of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on January 28, 1974.

Respondent is currently under investigation by the Counsel for Discipline of the Nebraska Supreme Court as a result of his conviction in the district court for Denver County, Colorado, in the case of "*State of Colorado v. David A. Johnson*, 08-CR-000894." On August 21, 2008, pursuant to a plea agreement with the State of Colorado, respondent was found guilty of violating Colo. Rev. Stat. Ann. § 18-4-401(1) and (2)(c) (West Cum. Supp. 2008) (theft in excess of $1,000 but less than $20,000) and Colo. Rev. Stat. Ann. § 39-21-118(1) and (3) (West 2007) (tax evasion and failure to file tax report).

On March 19, 2009, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent does not challenge or contest the truth of the allegations made against him. In addition to surrendering his license, respondent consented to the entry of an order of disbarment and waived his right to notice, appearance, and hearing prior to the entry of the order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has voluntarily stated he knowingly does not challenge or contest the truth of the allegations against him that he was found guilty of theft, tax evasion, and failure to file a tax report. The court accepts respondent's surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. PHILLIP G. WRIGHT, RESPONDENT.

764 N.W.2d 874

Filed May 8, 2009. No. S-07-119.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Attorney Fees.** An attorney who renders services in recovering or preserving a fund in which a number of persons are interested may in equity be allowed his or her compensation out of the whole fund, where the services are rendered on behalf of and are of benefit to the common fund.
4. **Attorney Fees: Subrogation.** An attorney is allowed to retain at least a portion of a reduction in a lienholder's subrogated interest as compensation for the work done by the attorney in obtaining the settlement or award which allows payment by the plaintiff to his or her lienholders.
5. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. The Nebraska Supreme Court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.
6. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for respondent.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

PER CURIAM.

I. INTRODUCTION

The office of the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Phillip

G. Wright. Following a hearing, the referee concluded that Wright had violated various provisions of the Nebraska Code of Professional Responsibility and of the Nebraska Rules of Professional Conduct, as well as Neb. Rev. Stat. § 7-104 (Reissue 2007). The referee recommended a suspension for 1 year, followed by 2 years' monitored probation. In addition, the referee recommended that Wright be required to take a course in law office management and proper trust account practices and also to repay clients for excessive fees charged by Wright.

II. FACTUAL BACKGROUND

Wright is an attorney licensed to practice law in Nebraska. His practice is based in Omaha, Nebraska. Wright has a general practice, though many of his cases appear to be personal injury, workers' compensation, and Social Security disability matters. Wright employs other attorneys to assist him with this practice. Two such attorneys—David Handley and Eric Sagehorn—filed a grievance against Wright on December 5, 2005, due to concerns over Wright's practices regarding office management. Handley and Sagehorn's grievance was investigated, and formal charges were filed. As amended, these formal charges involve 13 counts against Wright. Twelve counts involved Wright's representation of various clients; the final count involved a letter from Wright to Handley and Sagehorn.

Many of the charges against Wright involve similar conduct, but with respect to different clients. Where that is the case, for the sake of simplicity, we have consolidated our discussion of the relevant facts.

1. Timeliness in Paying Creditors

Wright was accused of failing to timely pay bills incurred by him in connection with his representation of clients in nine separate cases—Diana Bryan, Elizabeth Calta, Kimberly Gibb, Elizabeth Ireland, Joan Johnson, Johnny McDowell, Merlie Miller, Brandy Richards, and LaKeiya Titsworth. In all instances, the funds to repay these creditors had been withheld from the client following settlement and disbursement of the client's case; depending on the case, Wright did not pay the creditor until 6 to 12 months after settlement.

In connection with this allegation, Wright was accused of violating Canon 1, DR 1-102(A)(1), and Canon 9, DR 9-102(A) and (B), of the Code of Professional Responsibility and § 7-104 in matters involving eight clients and of violating Neb. Ct. R. of Prof. Cond. §§ 3-501.15 and 3-508.4 and § 7-104 in a matter involving one client. The referee concluded that Wright's conduct violated DR 1-102(A)(1), DR 9-102(B)(3) and (4), §§ 3-501.15 and 3-508.4, and § 7-104.

2. Refunding Money Owed to Clients

Wright was also accused of failing to timely refund money owed to a client. In the first instance, the Bryan case, a refund of $15 was received by Wright for a portion of a filing fee. The filing fee had been withheld from the client's settlement disbursement, but the refunded amount was not paid to Bryan until nearly 8 months after receipt by Wright.

In a second incident, another client, McDowell, had $22.50 withheld from a disbursement. Nineteen months later, McDowell settled another matter, with Wright again acting as counsel. This time $45.50 was withheld; this amount included the $22.50 previously withheld. Though it is not entirely clear from the record, McDowell was apparently later reimbursed.

In connection with these allegations in the Bryan and McDowell cases, Wright was accused of violating DR 1-102(A)(1), DR 9-102(A) and (B), and § 7-104. The referee concluded that Wright's conduct violated DR 1-102(A)(1), DR 9-102(B)(3) and (4), and § 7-104.

3. Charging Excessive Fees

The formal charges also alleged that Wright charged an excessive fee in several cases. First, in his representation of Bryan, Wright was accused of improperly retaining, as a fee, a reduction in a subrogation interest. The record shows that Wright, through his employee Handley, negotiated a reduction of $955.84 in a subrogation interest belonging to a medical lienholder. Wright's fee agreement allowed Wright to retain the entirety of this reduction as a fee. In connection with this allegation, Wright was charged and found to have violated DR 1-102(A)(1); Canon 2, DR 2-106; and § 7-104. The referee concluded that "the evidence is not clear and convincing that

[Bryan] did not comprehend or assent to the terms of her written fee agreement," but that the fee was nevertheless excessive because it was in excess of the one-third contingency agreement she signed.

Wright was also accused of violating DR 2-106 by charging an excessive fee in his representation of Terrance Wallace. In this case, Wright's fee exceeded the 25 percent of a Social Security award received by Wallace. Generally speaking, under federal law, an attorney fee in a Social Security case can be no more than the lesser of 25 percent of an award or $4,000. Wallace was charged a fee of $1,035, but, based upon Wallace's award, Wright was entitled to only $154.50. The referee concluded there was clear and convincing evidence to prove this violation and recommended that Wright be ordered to repay Wallace $1,035.

Finally, Wright was charged both with charging an excessive fee and with handling a legal matter without adequate preparation, in violation of DR 1-102(A)(1), (4), and (6); DR 2-106; and Canon 6, DR 6-101(A)(2), in the representation of David Sheldon. As a result of a large Social Security award made to Sheldon, Sheldon's disability insurer made a request to be repaid $13,920.44 in funds it argued were overpaid. Sheldon submitted these funds to Wright. Several days later, Wright informed Sheldon that he had found a loophole and that Sheldon did not owe the money. Wright then withheld a fee of $4,640.66, or approximately one-third of the alleged overpayment, and refunded the balance to Sheldon, who spent the money. The insurer subsequently demanded payment of the $13,920.44 and stopped paying Sheldon's disability check until the overpayment was repaid.

The referee concluded there was not clear and convincing evidence that Wright handled Sheldon's legal matter without adequate preparation, in violation of DR 6-101(A)(2). However, the referee did find clear and convincing evidence that Wright had violated DR 2-106 and § 7-104 by charging an excessive fee. The referee recommended that Wright be ordered to repay Sheldon $4,640.66.

4. Misusing Trust Account

The Counsel for Discipline also alleged that in two separate representations, Wright misused his trust account. In the Gibb case, Wright advanced costs to Gibb out of Wright's trust account without having received any funds from or on behalf of Gibb. In the Titsworth representation, Wright deposited settlement proceeds into his trust account; then, rather than withdrawing his earned fee and the expenses withheld from the settlement, he wrote checks (including checks for matters unrelated to the Titsworth representation) directly on the trust account, essentially using it as a business expense account.

The Counsel for Discipline alleged that Wright's conduct in the Gibb case violated DR 1-102(A)(1) and (4), DR 9-102(A) and (B), and § 7-104 and that Wright's conduct in the Titsworth case violated §§ 3-501.15 and 3-508.4 and § 7-104.

The referee concluded that in the Gibb case, there was clear and convincing evidence that Wright was commingling funds, but that there was not clear and convincing evidence that in advancing funds to Gibb, Wright was using other clients' funds. As such, the referee found violations of DR 1-102(A)(1), DR 9-102(A) and (B), and § 7-104. And in the Titsworth case, the referee found violations of §§ 3-501.15 and 3-508.4 and § 7-104.

5. Improperly Charging Fees in Social Security Cases

Wright was also accused, in several separate instances, of failing to have his fees from Social Security cases approved by the court as required by federal law. In addition, he was also accused of altering a contingent fee agreement into an hourly agreement in some of those cases.

In connection with these allegations, Wright was charged with violating DR 1-102(A)(1), (4), and (6); DR 2-106; DR 9-102(A) and (B); and § 7-104. The referee found that in the cases of McDowell, Mike Robbins, Wallace, and Sheldon, Wright violated § 7-104 and failed to have his fee approved by the court.

6. Letter to Handley and Sagehorn

Finally, as is noted above, the allegations against Wright originated in a grievance filed by Handley and Sagehorn, former Wright associates. The grievance was filed on December 5, 2005, after both attorneys had terminated their employment relationships with Wright. After receiving notice of the grievance, Wright wrote a letter to Handley and Sagehorn indicating that he would sue them for libel and defamation unless they withdrew their grievance.

The Counsel for Discipline alleged that pursuant to Neb. Ct. R. § 3-322(A), reports of alleged misconduct are absolutely privileged and no lawsuit may be predicated upon such reports. The Counsel for Discipline thus contended that Wright's conduct in writing this letter was a violation of § 3-508.4(a) and (d) and Neb. Ct. R. of Prof. Cond. § 3-503.1. The referee found there was clear and convincing evidence that Wright violated § 3-508.4(d).

7. Recommended Sanction

The referee recommended that Wright be suspended from the practice of law for 1 year and that upon reinstatement, he be placed on monitored probation for an additional 2 years. The referee also recommended that Wright be required to take a course in law office management and proper trust account practices and to repay Sheldon in the amount of $4,640.66 and Wallace in the amount of $1,035.

III. ASSIGNMENTS OF ERROR

Wright makes 28 separate assignments of error, which can generally be restated as two: (1) The referee erred in finding that Wright violated the Nebraska Code of Professional Responsibility and the Nebraska Rules of Professional Conduct, and (2) the referee erred in his recommended sanction.

IV. ANALYSIS

As an initial matter, we note that some of Wright's conduct now at issue occurred prior to September 1, 2005, and is governed by the now-superseded Code of Professional Responsibility, while other conduct occurred on or after September 1, the

effective date of the Nebraska Rules of Professional Conduct, and is therefore governed by those rules.

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[1]

[2] Disciplinary charges against an attorney must be established by clear and convincing evidence.[2]

The allegations against Wright fall into the following categories: (1) timeliness in paying creditors, (2) refunding money owed to clients, (3) charging excessive fees, (4) misusing a trust account, (5) improperly charging fees in Social Security cases, and (6) the letter to Handley and Sagehorn. We generally discuss these allegations in the order in which they were addressed by the referee, and not necessarily by the severity of the conduct charged.

1. Timeliness in Paying Creditors

Wright first argues that the referee erred in finding that he committed ethical violations by failing to timely pay the creditors of clients in instances in which such funds had been withheld from a client's settlement. The Counsel for Discipline alleged, and the referee found, that such misconduct was a violation of DR 1-102(A)(1) (violation of disciplinary rule), DR 9-102(B)(3) and (4), and § 7-104. DR 9-102 provides in relevant part:

> (B) A lawyer shall:
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> . . . .
>
> (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession

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[1] *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004).

[2] *Id.*

> of the lawyer and render appropriate accounts to the client regarding them.
>
> (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

We conclude that there is not clear and convincing evidence that Wright violated DR 1-102(A)(1) and DR 9-102(B)(3) and (4). Unlike § 3-501.15(d), discussed below, DR 9-102(B)(3) and (4) do not address funds that might be owed to a third party. As such, any lack of timeliness by Wright in failing to repay his clients' creditors is not a violation of DR 1-102(A)(1), DR 9-102, or § 7-104.

We note that Wright's actions might be a violation of DR 6-101(A)(3), dealing with the neglect of a client matter. And indeed, the referee found a violation of this rule. However, with the exception of the Calta representation, in which the referee found no violations, DR 6-101(A)(3) was not charged by the Counsel for Discipline in connection with any of the counts regarding Wright's alleged lack of timeliness in paying creditors. Therefore, despite the referee's conclusion, we find no violation of DR 6-101(A)(3).

The Counsel for Discipline also alleged, and the referee found, that Wright violated §§ 3-501.15 and 3-508.4(a) when he failed to repay the creditors of another client, Titsworth. Section 3-508.4(a) deals with the violation of a rule of professional conduct, while § 3-501.15 deals with safeguarding property and generally provides that an attorney must safeguard the property of a client and of third parties and notify and promptly pay a client or third parties funds belonging to them.

We conclude there is not clear and convincing evidence that Wright violated § 3-501.15 or § 3-508.4(a). Unlike the Code of Professional Responsibility, § 3-501.15(d) specifically provides that an attorney has an obligation to "promptly" deliver to any third party property belonging to that party. However, in the Titsworth case, Wright withheld the funds for the unpaid bills from Titsworth's settlement in September 2005 and had paid all outstanding debts by December. We decline

to find that Wright did not "promptly" deliver those funds to the creditors when the bills were paid within 3 months of Titsworth's settlement.

We conclude there was not clear and convincing evidence presented that Wright violated DR 1-102(A)(1), DR 9-102(B)(3) and (4), § 3-501.15, § 3-508.4(a), or § 7-104.

2. Refunding Money Owed to Clients

Wright also argues that he did not engage in unethical activity when he failed to refund money to clients for periods up to 8 months. The referee found that Wright had violated DR 1-102(A)(1), DR 9-102(B)(3) and (4), and § 7-104 in both instances. DR 1-102(A)(1) provides that it is against the Code of Professional Responsibility to violate a disciplinary rule; DR 1-102(A)(4), which the Counsel for Discipline also charged Wright with violating in both instances, prohibits an attorney from engaging in activity involving dishonesty, fraud, deceit, or misrepresentation. DR 9-102(B)(3) and (4) are set forth above and deal with preserving the identity of client funds.

(a) Bryan Representation

In the Bryan case, a $15 refund was received from the Douglas County clerk's office on July 12, 2005. This money was not refunded to Bryan until March 2006. We find no clear and convincing evidence that Wright violated DR 9-102(B)(3) and (4) when he failed to promptly refund this money to Bryan. DR 9-102(B)(3) requires a lawyer to render appropriate accounts to a client, while DR 9-102(B)(4) requires a lawyer to promptly pay a client as requested. In this case, Wright's failure to promptly refund funds owed to Bryan falls into neither category. Nor do we believe the record supports a finding that Wright's actions constituted conduct involving fraud, dishonesty, deceit, or misrepresentation in violation of DR 1-102(A)(4).

However, Wright's failure to timely refund this money does fall within DR 9-102(B)(1), which was charged by the Counsel for Discipline and holds that a lawyer should promptly notify a client of the receipt of his or her funds. Because this court reviews this action de novo on the record,

we can and do conclude that there was clear and convincing evidence of a violation of DR 1-102(A)(1), DR 9-102(B)(1), and § 7-104.

(b) McDowell Representation

With respect to the McDowell case, the same $22.50 was withheld from McDowell's settlements in two different cases—once in August 2003 and again in March 2005. The formal charges assert that Wright "fraudulently recovered this cost advance a second time." The referee, however, found that McDowell was repaid.

We conclude here, as we did with respect to the Bryan representation, that there was not clear and convincing evidence that Wright violated DR 1-102(A)(4) or DR 9-102(B)(4). However, we conclude there is clear and convincing evidence that Wright violated DR 1-102(A)(1), DR 9-102(B)(3), and § 7-104 by recovering the $22.50 from McDowell twice. Even assuming that Wright eventually did reimburse McDowell, by withholding funds twice to pay the same bill, Wright failed to render appropriate accounts to McDowell as required by DR 9-102(B)(3).

3. Charging Excessive Fees

Wright next argues that the referee erred in finding that he charged Bryan, Wallace, and Sheldon excessive fees.

(a) Bryan Representation

In the Bryan case, Handley, on Wright's behalf, negotiated and reduced the subrogated interest of a medical lienholder by $955.84. Wright retained the entire amount of the reduction as a fee, which was allowed by Bryan and Wright's contingent fee agreement. The referee concluded that "the evidence is not clear and convincing that [Bryan] did not comprehend or assent to the terms of her written fee agreement," but nevertheless determined that Wright charged an excessive fee. The referee found a violation of DR 1-102(A)(1), DR 2-106, and § 7-104.

A review of Wright's brief reveals Wright's primary defense to be that his fee agreement with Bryan allowed Wright to

retain any reduction in subrogation interests and that Bryan understood and did not complain about that provision.

It is true that Wright's agreement provided that he could retain the reduction in the lien in this case. And we agree with the referee that there was not clear and convincing evidence presented that Bryan did not understand this at the time she signed the agreement. But, as we recently noted in *Hauptman, O'Brien v. Turco*,[3] what is permitted by the fee agreement is only part of this court's consideration. We also are concerned with whether the fee charged was reasonable. And we conclude this fee was not reasonable.

[3,4] Wright indicated at his hearing that the "Hauptman O'Brien" case dealing with the "common fund doctrine" authorized him to retain this reduction in the subrogation interest. It appears that Wright was referring to *Hauptman, O'Brien v. Milwaukee Guardian*,[4] a decision rendered by the Nebraska Court of Appeals. In that case, the Court of Appeals explained:

> [T]he common fund doctrine applies when an attorney (1) expends time and effort in (2) creating a common fund in which others are interested, and (3) the party with the subrogation interest has substantially benefited from the attorney's efforts in creating the fund. Additionally, the amount of the attorney fee awarded does not necessarily correspond with the contract between the attorney and the insured, but instead depends on the nature of the services rendered and the general considerations applicable to court awards of attorney fees.[5]

Thus, an attorney is allowed to retain at least a portion of the reduction in a lienholder's subrogated interest as compensation for the work done by the attorney in obtaining the settlement or award which allows payment by the plaintiff to his or her lienholders.

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[3] *Hauptman, O'Brien v. Turco*, 273 Neb. 924, 735 N.W.2d 368 (2007).

[4] *Hauptman, O'Brien v. Milwaukee Guardian*, 7 Neb. App. 60, 578 N.W.2d 83 (1998).

[5] *Id.* at 66, 578 N.W.2d at 87.

The purpose of the common fund doctrine was to require a lienholder, as one who shared in the work of the attorney, to also share in the costs of that representation; it was not intended as a means to allow an attorney to be paid two (or more) times by different parties for the same services. But the latter is exactly what occurred in this case. In addition to receiving his one-third of Bryan's settlement under the fee agreement, Wright retained the $955.84 from the reduction in the lien. In doing so, Wright was paid twice for doing the same work—$955.84 by the lienholder and $13,666.73 by Bryan. We conclude there is clear and convincing evidence that Wright violated DR 1-102(A)(1), DR 2-106, and § 7-104. We further order Wright to repay to Bryan the excessive fee he charged in the amount of $955.84.

(b) Wallace Representation

Wright was also found to have violated DR 2-106 and § 7-104 by charging an excessive fee in the Wallace representation. In Wallace, initially there was no written fee agreement. Some months into the representation, Wallace agreed to an hourly fee agreement. Irrespective of this agreement, however, Wright's fee was limited by federal law to the lesser of 25 percent of back benefits or $4,000.

Prior to the award of Wallace's Social Security benefits, a fee of $1,035 (based on this hourly fee agreement) was deducted from Wallace's separate workers' compensation settlement. Wallace's Social Security award was entered in December 2004 in the amount of $309 monthly beginning in October 2004. Wallace's total award to that date was therefore $618. Based upon this award, at the time Wright charged the $1,035 fee, he could have applied for approval of a fee of no more than 25 percent of the $618 amount, for a total of just $154.50.

It is axiomatic that $1,035 is an excessive fee when the fee should have been limited to just $154.50. We therefore find clear and convincing evidence that Wright violated DR 2-106 in charging this fee. Moreover, we agree with the referee that Wright should repay $1,035 to Wallace.

(c) Sheldon Representation

Wright next alleges that the referee erred in finding that he charged an excessive fee in connection with his representation of Sheldon. The referee found clear and convincing evidence that Wright violated DR 2-106 and § 7-104.

In this case, Sheldon remitted to Wright $13,920.44 pursuant to a request from Sheldon's disability insurer. According to the insurer, the amount was an overpayment of disability payments. Wright retained the money for a few days, then withheld $4,640.66 and returned the rest to Sheldon on November 26, 2004. At this time, Wright indicated that Sheldon did not need to pay the money. But in August 2005, the insurer again requested that Sheldon refund the overpayment; by this point, Sheldon had spent the money.

Wright argues that he had reached an agreement with the insurer that Sheldon did not have to refund the overpayment. There is evidence in the record that Wright was in the process of negotiating with the insurer regarding the overpayment. But there is no evidence, other than Wright's testimony, that an agreement had been reached. For this advice, Wright charged Sheldon $4,640.66. We find that such is clear and convincing evidence that Wright charged an excessive fee in violation of DR 2-106 and § 7-104. In addition, we agree with the referee that Wright should repay to Sheldon the $4,640.66 fee.

4. Misusing Trust Account

Next, Wright contends the referee erred in finding that he committed several trust account violations. Wright was accused of, and the referee found, various trust account violations contrary to DR 1-102(A)(1) and DR 9-102(A) and (B) of the Code of Professional Responsibility and §§ 3-501.15 and 3-508.4(a) of the Nebraska Rules of Professional Conduct. The basis for these allegations arose in the Gibb and Titsworth representations. In both instances, Wright was accused of using his trust account as a business expense account. In the Gibb representation, Wright advanced costs to Gibb from his trust account though no funds in the trust account belonged to Gibb. And in the Titsworth representation, Wright deposited her settlement

proceeds, then paid directly from the trust account a number of expenses unrelated to Titsworth's case.

DR 9-102(A) provides:

> All funds of clients paid to a lawyer or law firm shall be deposited in an identifiable account or accounts maintained in the state in which the law office is situated in one or more state or federally chartered banks, savings banks, savings and loan associations, or building and loan associations insured by the Federal Deposit Insurance Corporation, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
>
> (1) Funds reasonably sufficient to pay account charges may be deposited therein.
>
> (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

DR 9-102(B) is set forth in part above and generally provides that a lawyer shall promptly notify a client of the receipt of his or her funds or other property, safeguard client securities or property, maintain complete records, and promptly pay or deliver funds or property to a client upon request.

Section 3-501.15 generally requires an attorney to safeguard the property of a client and of third parties and to notify and promptly pay a client or third parties funds belonging to them. And § 3-508.4(a) makes it professional misconduct to knowingly violate a rule of professional conduct.

(a) Gibb Representation

Turning first to the Gibb representation, Wright is accused of not withdrawing the full amount of his earned fee from his trust account at the time it was earned, and instead leaving a portion of that fee in his trust account. However, there is nothing in DR 9-102 that explicitly requires an attorney to withdraw funds upon earning them. DR 9-102(A)(2)

states in part that "the portion belonging to the lawyer or law firm may be withdrawn when due" but does not impose an absolute requirement that the funds be withdrawn. And while DR 9-102(B)(3) requires an attorney to keep complete records, there is no evidence that such records were not kept. The only allegation against Wright is that the funds were not withdrawn. We therefore conclude there is not clear and convincing evidence that Wright violated DR 1-102(A)(1) or DR 9-102(A) and (B).

(b) Titsworth Representation

In the Titsworth representation, Wright was accused of not promptly paying Titsworth and her creditors and of not withdrawing all of his earned fees. According to the Counsel for Discipline, Wright used the account as a business expense account, advancing costs to other clients. But as with DR 9-102, there is nothing in § 3-501.15 that specifically states when earned fees must be withdrawn; rather, it provides only a prohibition against withdrawing any client money until it is earned or until expenses are incurred. In this case, Wright stands accused of not withdrawing his earned fee promptly, but is not accused of withdrawing funds he did not earn.

We conclude that there is not clear and convincing evidence that Wright violated § 3-501.15 or § 3-508.4(a). However, we note that as with DR 9-102, § 3-501.15 requires an attorney to keep complete records of account funds. Practices such as Wright's could lead to problems with recordkeeping and are therefore discouraged.

5. Improperly Charging Fees in Social Security Cases

Other allegations against Wright involved the fees he charged in four Social Security cases—those involving McDowell, Robbins, Wallace, and Sheldon. Wright asserts the referee erred in finding ethical violations in Wright's failure to get certain fees approved and in Wright's modifying contingent fee agreements into hourly fee agreements.

We first address Wright's failure to get his fees approved by the court as required by federal law. The referee concluded

Wright's actions violated his oath of office as an attorney under § 7-104. Wright argued that he failed to have the fees approved because at the time, he believed the particular fees did not need approval.

In addition to an alleged violation of § 7-104, the Counsel for Discipline also charged Wright with violations of DR 1-102(A)(1), (4), and (6). DR 1-102(A)(1) is violated when another disciplinary rule is violated, while DR 1-102(A)(4) provides that a lawyer should not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. DR 1-102(A)(6) provides that an attorney should not "[e]ngage in any other conduct that adversely reflects on his or her fitness to practice law."

We agree with the referee that Wright's interpretation of federal law was not entirely unreasonable, given language in 42 U.S.C. § 406 (Supp. V 2005) which provides that fees under a certain amount "shall" be approved. Nevertheless, approval was required and was not sought in these cases.

Because there is evidence that Wright's failure was not done in bad faith, but instead was the result of a misinterpretation of the relevant law, we conclude there is not clear and convincing evidence that Wright engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. However, Wright did fail to gain court approval of fees when required to do so by federal law. We determine that this failure to follow the law is conduct that reflects adversely upon Wright's fitness to practice law. We therefore conclude that there is clear and convincing evidence that Wright violated DR 1-102(A)(1) and (6), as well his oath of office as an attorney under § 7-104, when he failed to have these fees approved.

We next turn to the issue of whether Wright violated any ethical rules when he modified certain contingent fee agreements into hourly fee agreements. A fee agreement between an attorney and a client is an enforceable contract, whether oral or written,[6] and thus may be modified by the agreement

[6] See *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000).

of the parties.[7] Wright indicated that the parties agreed to the modifications of the agreement, and there is no evidence to contradict this. We therefore conclude there was not clear and convincing evidence to show that any charged ethical violations occurred by virtue of the modification of these fee agreements.

6. Letter to Handley and Sagehorn

Finally, Wright argues that the referee erred in finding that he violated any ethics rules by threatening to sue Handley and Sagehorn if they did not withdraw their complaint. In the formal charges, the Counsel for Discipline alleged that Wright's conduct in writing the letter was a violation of §§ 3-503.1 and 3-508.4(a) and (d). The referee found that Wright violated § 3-508.4(d) (engaging in conduct prejudicial to the administration of justice). Wright admits writing the letter, but argues that the letter was directed at making Handley and Sagehorn cease defaming him to his clients and stopping Handley from trying to extort money from him by requesting the payment of compensation to which Handley was not entitled.

We conclude there was clear and convincing evidence that Wright violated § 3-508.4(d) by writing the letter. Contrary to Wright's assertion, a review of the letter in question makes no reference to communications to clients or Handley's request for compensation. Instead, a plain reading of that letter indicates the letter was intended to do exactly what the Counsel for Discipline is alleging in this action—threatening to sue if the grievance was not withdrawn. Such is contrary to § 3-322(A), which states that reports of alleged misconduct are absolutely privileged and that no lawsuit may be predicated upon such reports. We therefore find that there is clear and convincing evidence of a violation of § 3-508.4(d).

7. Appropriate Discipline

Finally, we turn to the question of the appropriate discipline. Neb. Ct. R. § 3-304 states that the following may be considered as discipline for attorney misconduct:

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[7] See, generally, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court[.]
> . . . .
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

[5,6] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[8] This court will consider the attorney's acts both underlying the alleged misconduct and throughout the proceeding.[9] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding also requires the consideration of any aggravating or mitigating factors.[10]

The referee recommended that Wright be suspended for 1 year, to be followed by 2 years of monitored probation, and also that Wright be required to repay Wallace and Sheldon the excessive fees he charged. In addition, the referee recommended that Wright be required to take courses in law office management. The Counsel for Discipline suggests that suspension for up to 2 years would be appropriate, but did not take exception to the 1-year suspension recommended by the referee.

In *State ex rel. Counsel for Dis. v. Widtfeldt*,[11] we suspended an attorney for 1 year for charging excessive fees in two separate probate proceedings, though we noted that the attorney was currently suspended as a result of different charges. And in *State ex rel. NSBA v. Mefferd*,[12] we suspended an attorney for 1

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[8] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[9] *Id.*

[10] *Id.*

[11] *State ex rel. Counsel for Dis. v. Widtfeldt*, 271 Neb. 851, 716 N.W.2d 68 (2006).

[12] *State ex rel. NSBA v. Mefferd*, 258 Neb. 616, 604 N.W.2d 839 (2000).

year for, among other violations, failing to properly account for and refund an overpayment to clients.

In this case, Wright has been found to have committed numerous violations of the Rules of Professional Conduct and the Code of Professional Responsibility. We are particularly disturbed by Wright's charging of excessive fees. With respect to Bryan, Wright's retention of the reduction in the subrogation interest effectively resulted in his being paid twice for the same work. And in the Sheldon case, Wright withheld a fee from Sheldon's overpayment and returned the balance to Sheldon, even though there is no evidence other than Wright's testimony that an agreement had been reached with the insurer regarding the overpayment. And the fee in the Wallace case greatly exceeded the amount to which Wright was entitled under federal law.

Also of concern to us is the letter Wright wrote to Handley and Sagehorn threatening suit if they did not withdraw the complaint filed against him. As is noted above, we do not find Wright's explanation convincing, and this court will not condone Wright's actions in writing this letter. If indeed Wright was concerned that the allegations against him were made in an attempt to defame or extort from him, such an explanation should have been proffered to the Counsel for Discipline.

We do take into consideration, in mitigation, letters written in support of Wright, as well as the fact that Wright is active in his local community. And apparently, Wright cooperated with the Counsel for Discipline's investigation into this matter. We further note that at least in some respects, Wright has taken responsibility for his actions, in that he has indicated he has taken steps to learn and implement better office management techniques. Yet, Wright has not taken full responsibility for his actions; it is evident from the record that Wright still blames Handley and Sagehorn for the charges filed against him.

We therefore conclude that Wright should be and hereby is suspended from the practice of law for a period of 9 months, effective immediately. Following the completion of that suspension, Wright shall be placed on monitored probation for a period of 2 years. In addition, we order Wright to complete a

course in law office management and to repay the excessive fees charged to Bryan, Wallace, and Sheldon.

V. CONCLUSION

We find by clear and convincing evidence that Wright violated various provisions of the Code of Professional Responsibility and Rules of Professional Conduct. It is the judgment of this court that Wright be suspended from the practice of law for a period of 9 months, effective immediately. Following that suspension, Wright shall be placed on monitored probation for a period of 2 years. In addition, Wright shall complete a course in law office management.

Wright shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court. At the end of his suspension period, Wright may apply to be reinstated to the practice of law, provided that he has paid restitution to Bryan, Wallace, and Sheldon; that he has demonstrated his compliance with § 3-316; and, further, that the Counsel for Discipline has not notified this court that Wright has violated any disciplinary rule during his suspension. We also direct Wright to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

MILLER-LERMAN, J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. HAROLD TITUS SWAN, RESPONDENT.

764 N.W.2d 641

Filed May 8, 2009. No. S-08-110.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the charge must be supported by clear and convincing evidence.

3. **Disciplinary Proceedings.** Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and requires the consideration of any aggravating or mitigating factors.
4. ____. In an attorney discipline proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.
5. ____. Continuing commitment to the legal profession and the community and cooperation during disciplinary proceedings are mitigating factors in an attorney discipline case.
6. ____. The propriety of a sanction must be considered with reference to the sanctions imposed by the Nebraska Supreme Court in prior attorney discipline cases presenting similar circumstances.

Original action. Judgment of public reprimand.

John W. Steele, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent.

WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

NATURE OF CASE

Harold Titus Swan was convicted in federal court of making and delivering a writing containing a statement known to be false. As a result of this conviction, Swan was charged with violations of Canon 1, DR 1-102, and Canon 7, DR 7-102, of the Code of Professional Responsibility (Code). Swan appeals the referee's conclusion that his conviction is clear and convincing evidence sufficient to impose discipline under the Code.

BACKGROUND

Swan has been licensed to practice law in the State of Nebraska since September 1981. From 1983 to 2006, he served on the board of directors of the First National Bank of Holdrege (Bank). Swan estimated that he performed approximately 5 to 10 hours of legal work per month for the Bank. One of the Bank's customers was CLN Enterprises (CLN), which operated a grain elevator in Atlanta, Nebraska.

During the relevant time period, grain prices were at historic highs, so farmers were looking to lock in the high prices for crops in future years. Grain elevators across the country were utilizing hedge-to-arrive (HTA) contracts to price grain for future delivery. An HTA is a forward pricing contract whereby the grain elevator hedges, on behalf of the farmers, the current trading price at the Chicago Board of Trade so the farmers can lock in that price, even though the farmers will not deliver the grain until a future date. The overall contract price is adjusted by the price of the grain at the time the farmer delivers.

The Bank loaned money to CLN based on these HTA contracts. Unexpectedly, the price of corn continued to rise, which decreased the value of the contracts. This required CLN to make margin calls on the contracts. A margin call is a broker's demand on an investor using borrowed funds to deposit additional money or securities in the margin account so that the account maintains a minimum value.

If CLN failed to make the margin call payments, it was expected that the Chicago Board of Trade would liquidate a sufficient number of the contracts to bring CLN's account up to the minimum required value. The result of this would be that the farmers would lose the locked-in contract price. Further, the elevator could "go under," resulting in the farmers' having claims against the elevator or defaulting on their own loans.

CLN borrowed money from the Bank to cover the margin calls, and this cost was passed on to the farmers when they settled the contracts by delivering the grain. CLN was ultimately liable for only the interest on the money borrowed to cover the margin calls.

By spring 1996, CLN was nearing its lending limit with the Bank. Exceeding the lending limit was considered to be an unsafe and unsound banking practice, so the Bank's loan review officer proposed having the farmers borrow the money from the Bank to cover their own margin calls and forward the money to CLN to make the margin call payments. The premise was the same as when CLN was borrowing the money directly—the principal amount of the loan would be taken out of the amount the farmers received when they delivered

the grain and CLN would be responsible for the interest on the loans.

The practice of having the farmers borrow the money and forward it to CLN enabled CLN to continue financing the margin calls without directly exceeding its lending limit with the Bank. On April 8, 1996, Swan was asked to draft an addendum to the HTA contracts that would outline how the margin calls were going to be financed. Swan was told that the addendum was needed because the individual farmers wanted assurances that CLN would properly credit the farmers for the interest paid to the Bank to maintain the margin calls.

Swan drafted the addendum, and CLN presented the addendum to farmers who had signed HTA contracts with CLN and who agreed to borrow money from the Bank to cover their own margin calls. Due to the changes in grain prices, many of the farmers lost money on the contracts. In turn, the Bank sued some of the farmers on the loans used to make the margin calls. Some of the farmers complained that CLN had misrepresented the addendum to imply that they would not be personally liable on the loan for any deficiency.

The Office of the Comptroller of the Currency investigated the Bank's actions in 1997. The comptroller concluded that the Bank's loans to the farmers should have been considered part of CLN's credit limit rather than separate lines of credit. A second investigation in 2002 concluded that the Bank's records "'did not reveal any clear attempt by prior management to knowingly and deceptively hide the truth'" of the HTA loans. However, there was a subsequent criminal investigation of the Bank and its loan officers and principals which resulted in the criminal indictment of Swan and others in the U.S. District Court for the District of Nebraska.

Swan was originally indicted in a multimember conspiracy. However, pursuant to a plea agreement, he pled guilty to a misdemeanor charge related to his drafting of the addendum as it related to one farmer. Swan pled guilty to a violation of 18 U.S.C. § 1018 (2006), which reads as follows:

> **§ 1018. Official certificates or writings**
>
> Whoever, being a public officer or other person authorized by any law of the United States to make or give a

> certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined under this title or imprisoned not more than one year, or both.

The information filed in federal court alleged:

> On or about April 8, 1996, in the District of Nebraska, HAROLD TITUS SWAN, the defendant herein, being an attorney licensed to practice law by the State of Nebraska, and a Member of the Board of Directors of the . . . Bank . . . , a national bank located in Holdrege, Nebraska, and authorized by the law of the United States to make and give writings, did knowingly make and deliver as true such a writing, to wit, an Addendum to [the HTA] Contract, which he knew to contain false representations and statements, in that HAROLD TITUS SWAN, authorized to act as an attorney for the . . . Bank . . . , made and delivered the Addendum to [the HTA] Contract, knowing the document would be used to facilitate nominee loans from farmers with [HTA] Contracts for the benefit of [CLN,] d/b/a Atlanta Elevator, Inc., a grain elevator located in Atlanta, Nebraska, by representing in the Addendum that the farmer would not be responsible for payment of the nominee loan, when in truth and fact, SWAN knew the bank would attempt to recover loan proceeds from farmers if [CLN] failed to pay on the nominee loan, contrary to the terms of the Addendum, and Swan deliberately avoided learning the truth.
>
> In violation of Title 18, United States Code, Section 1018.

At the disciplinary hearing, Swan submitted an affidavit which included "Exhibit B," a one-page document titled "H. Titus Swan's Version of Events," which was a statement of facts Swan provided to the government that he agreed were true. The document included these statements:

> Mr. Swan was aware of a high probability that the Addendum would be used to facilitate nominee loans

> from farmers with CLN/HTA contracts to benefit CLN . . . and that if CLN . . . failed to repay the CLN/HTA related notes, the Bank would seek repayment from those farmers. Although Mr. Swan was aware that the Addendum would likely be used to facilitate nominee loans and that the Bank would seek payment from the farmers in the event CLN did not pay the loans, Mr. Swan deliberately avoided learning the truth of these matters. As a consequence, the . . . Bank . . . thereafter sought repayment of the loan proceeds from D&B Partnership when CLN . . . was unable to repay the notes. D&B Partnership was required to repay $62,500.00 on its notes to the . . . Bank . . . .
>
> Mr. Swan acknowledges that the circumstances and his conduct constitute willful blindness with respect to the written Addendum to the [HTA] contract. Mr. Swan's willful blindness and actions as a licensed attorney and Director of the . . . Bank . . . constitute a false writing, in violation of 18 U.S.C. § 1018 as alleged in the Information.

On October 9, 2007, the federal court sentenced Swan to 3 years' probation, including 3 months on electronic home monitoring. He was also ordered to attend a victim impact class, perform 180 hours of community service, pay a fine of $25,000, and make restitution in the amount of $110,000 to two farmers.

ASSIGNMENT OF ERROR

Swan assigns as error the referee's finding that the Counsel for Discipline was relieved of its burden of proof on whether Swan committed acts that violated the Code because Swan pled guilty to a federal criminal charge.

STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[1] To sustain a charge in a disciplinary proceeding

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[1] *State ex rel. Counsel for Dis. v. Hubbard*, 276 Neb. 741, 757 N.W.2d 375 (2008).

against an attorney, the charge must be supported by clear and convincing evidence.[2]

ANALYSIS

The issue is whether Swan's criminal conviction can be a basis for attorney discipline. Pursuant to Neb. Ct. R. § 3-326, for purposes of disciplining an attorney, a criminal conviction is conclusive evidence of the attorney's conduct that is the subject of the disciplinary action. Swan argues that the referee erred in considering only the elements of the crime of which he was convicted in determining whether he violated the Code. He claims that the referee should have examined the addendum prepared by Swan in analyzing whether his underlying conduct violated the Code.

The Code governs all attorney conduct occurring before September 1, 2005, and the Nebraska Rules of Professional Conduct (Rules) govern attorney conduct occurring after that date. The disciplinary action at bar was commenced as a result of Swan's plea of guilty to criminal charges in federal court on July 18, 2007. The federal conviction was based on Swan's conduct in 1996 and, therefore, would be governed by the Code. Although the charges and the referee's findings cited the Code, Swan addressed the issues using both the Rules and the Code almost interchangeably and the Counsel for Discipline presented arguments using only the Rules.

We conclude that it is Swan's 1996 conduct that is subject to discipline; therefore, the Code governs this action. However, we agree with the parties that the outcome in this case would be the same under both the Code and the Rules. The relevant portions of the Code are:

> DR 1-102 Misconduct.
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> . . . .
>
> (3) Engage in illegal conduct involving moral turpitude.

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[2] *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008).

> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> . . . .
>
> DR 7-102 Representing a Client Within the Bounds of the Law.
>
> (A) In his or her representation of a client, a lawyer shall not:
>
> . . . .
>
> (3) Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.
>
> . . . .
>
> (5) Knowingly make a false statement of law or fact.
>
> . . . .
>
> (7) Counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

The Counsel for Discipline filed charges against Swan on January 31, 2008, alleging violations of DR 1-102 and DR 7-102 of the Code based on Swan's federal court conviction. The Counsel for Discipline relied on § 3-326(A), which states:

> For the purposes of Inquiry of a Complaint or Formal Charges filed as a result of a finding of guilt of a crime, a certified copy of a judgment of conviction constitutes conclusive evidence that the attorney committed the crime, and the sole issue in any such Inquiry should be the nature and extent of the discipline to be imposed.

In his report, the referee initially found that § 3-326(A) relieved the Counsel for Discipline from the burden of proving by clear and convincing evidence that Swan violated the Code and that the only matter to decide was the proper discipline.

Swan's plea of guilty to the elements of the crime described in 18 U.S.C. § 1018 is conclusive evidence of his conduct, which the referee found to be clear and convincing evidence that Swan violated DR 1-102 and DR 7-102 of the Code. The information charged that Swan

> did knowingly make and deliver as true . . . an Addendum to [the HTA] Contract, which he knew to contain false representations and statements . . . knowing the document

> would be used to facilitate nominee loans from farmers with [HTA] Contracts for the benefit of [CLN] by representing in the Addendum that the farmer would not be responsible for payment of the nominee loan, when in truth and fact, SWAN knew the bank would attempt to recover loan proceeds from farmers if [CLN] failed to pay on the nominee loan, contrary to the terms of the Addendum . . . .

The conduct described above is clear and convincing evidence of misrepresentation, in violation of DR 1-102(A)(4), and the making of a false statement of fact, in violation of DR 7-102(A)(5).

We have relied on criminal convictions as evidence of a violation of the Code in prior attorney disciplinary cases. In *State ex rel. NSBA v. Duchek*,[3] an attorney pled guilty to one count of willful failure to file an income tax return in the U.S. District Court for the District of Nebraska. The Nebraska State Bar Association filed disciplinary charges against the attorney "in connection with the charges filed against him in the U.S. District Court."[4] We found that the attorney's willful failure to file an income tax return constituted misconduct involving moral turpitude and was a violation of the Code.[5]

In *State ex rel. NSBA v. Steier*,[6] the attorney was convicted of giving an illegal gratuity to a public official, a federal felony. We stated that "[t]he conviction evidences conduct that constitutes a violation of Canon 1, DR 1-102(A)(1), (3), and (6), of the Code of Professional Responsibility and a violation of his oath as an attorney."[7]

In *State ex rel. NSBA v. Dolan*,[8] the Committee on Inquiry of the First Disciplinary District filed charges against an attorney after he was found guilty in federal court of bankruptcy fraud

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[3] *State ex rel. NSBA v. Duchek*, 224 Neb. 777, 401 N.W.2d 484 (1987).

[4] *Id.* at 777, 401 N.W.2d at 485.

[5] *Duchek, supra* note 3.

[6] *State ex rel. NSBA v. Steier*, 246 Neb. 584, 520 N.W.2d 779 (1994).

[7] *Id.* at 584, 520 N.W.2d at 780.

[8] *State ex rel. NSBA v. Dolan*, 255 Neb. 44, 581 N.W.2d 892 (1998).

and conspiracy to commit bankruptcy fraud. The committee alleged that the attorney's criminal conviction violated his oath of office as an attorney and DR 1-102(A)(1), (3), and (5) of the Code. We agreed and disbarred the attorney.

In the case at bar, by pleading guilty to the federal offense, Swan admitted to the criminal conduct described in the information. Section 3-326(A) permits the Counsel for Discipline to consider Swan's conviction as conclusive evidence that he committed the federal crime. Such conduct may be considered as evidence when determining whether Swan violated the Code. Accordingly, the referee found by clear and convincing evidence that Swan's criminal conduct violated DR 1-102 and DR 7-102. We agree with the referee's findings.

[3] After determining that an attorney has violated the Code or the Rules, the remaining issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[9] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances, and requires the consideration of any aggravating or mitigating factors.[10]

[4,5] In an attorney discipline proceeding, an isolated incident not representing a pattern of conduct is considered as a factor in mitigation.[11] Continuing commitment to the legal profession and the community and cooperation during disciplinary proceedings are also mitigating factors.[12]

[6] The actions that prompted this proceeding occurred 13 years ago, and the evidence indicates that this was an isolated incident in Swan's 27-year legal career. Additionally, Swan offered many letters of support from members of the bar and

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[9] See *State ex rel. Counsel for Dis. v. Davis*, 276 Neb. 158, 760 N.W.2d 928 (2008).

[10] *Id.*

[11] *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

[12] See, *State ex rel. Special Counsel for Dis. v. Sivick*, 264 Neb. 496, 648 N.W.2d 315 (2002); *State ex rel. NSBA v. Frank*, 262 Neb. 299, 631 N.W.2d 485 (2001).

others in his community attesting to his character and integrity as a lawyer as well as his positive involvement in the community. The Counsel for Discipline noted that Swan assisted the banking authorities in sorting out the confusion caused by the Bank's questionable lending practices and cooperated during this disciplinary proceeding. Although the propriety of a sanction must be considered with reference to the sanctions imposed by this court in prior cases presenting similar circumstances,[13] the unique facts of this case are unlike any other case we have considered.

Considering all of the mitigating circumstances in this case, we agree with the referee that a public reprimand is appropriate.

CONCLUSION

Based on the record in this case, we conclude that Swan violated DR 1-102 and DR 7-102 of the Code. It is the judgment of this court that Swan should be, and hereby is, publicly reprimanded for conduct in violation of the Code. Swan is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PUBLIC REPRIMAND.

HEAVICAN, C.J., and CONNOLLY, J., not participating.

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[13] See *Frank, supra* note 12.

STATE OF NEBRASKA, APPELLEE, V.
JAMES L. BRANCH, APPELLANT.
764 N.W.2d 867

Filed May 8, 2009. No. S-08-781.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

2. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.
5. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Mary C. Gryva, of Frank & Gryva, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ., and CARLSON, Judge.

WRIGHT, J.

NATURE OF CASE

James L. Branch was convicted by a jury of kidnapping and robbery. He was sentenced to a term of 40 to 50 years in prison for the robbery conviction and to a term of life to life in prison for the kidnapping conviction. The sentences were ordered to be served concurrently. Branch appeals.

SCOPE OF REVIEW

[1,2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in

the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Davis*, *ante* p. 161, 762 N.W.2d 287 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008).

FACTS

James Clark operated a vehicle storage facility and sold used cars in Omaha, Nebraska. On July 16, 2007, he was beaten, robbed, and placed in the trunk of one of the cars at his building. The perpetrators took Clark's wallet, which contained at least one credit card, and car titles.

Clark's wife became concerned upon receiving a telephone call from a credit card company notifying her of unusual activity on the card. She tried to call Clark several times, but he did not answer. She then called a family friend and asked her to check on Clark.

The friend went to the storage facility and found that the front door of the building was locked, even though a sign stating "YES We're OPEN" was hanging on the door. She entered through a door on the side of the building and walked through the three levels. She did not find Clark and called his wife. While on the telephone, the friend saw Clark's dentures on the floor. She hung up and called the 911 emergency dispatch service.

When Clark's wife arrived at the storage facility, she saw on the floor a plastic clip from a telephone that Clark carried with him at all times. Police officers arrived and directed Clark's wife and the friend to wait in the office. About 20 minutes later, they found Clark in the trunk of a car.

Clark was hospitalized and placed in a drug-induced coma for 18 days. He remained in the hospital for a total of 27 days. Clark underwent rehabilitation for an additional 10 days and then received home health care for 4 months. At the time of trial, he was using a walker for mobility.

Clark testified that on the morning of July 16, 2007, he was on the show floor of his building. He felt an arm placed around his neck from behind. Clark identified the person as an African-American male. The man pulled tightly around Clark's neck, causing him to have difficulty breathing. Almost immediately, a second African-American male struck Clark in the face with hard, closed-fist punches. Clark said he was initially held upright by the person whose arm was around his neck. After the last punch, he was lowered to the ground. A wire was placed around his neck, and he was dragged by his feet to a nearby automobile and placed in the trunk.

Clark said he was dazed and only vaguely remembered the incident, but he believed he was unconscious when placed in the trunk. He woke up shortly afterward and tried to reach the key lock on the back side of the trunk lid, but he could not get to it because the area was carpeted. He also tried to use his glasses as a screwdriver to jimmy the lock, but the glasses broke. Clark believed he was in the trunk for about 6 hours, but after losing consciousness, the next thing he remembered was waking up in the hospital 3 weeks later.

Immediately prior to the assault, three African-American males entered the building, but Clark did not remember whether he had seen them before that date. He did not remember seeing them leave prior to the assault and could not identify the person who struck him in the face.

At Clark's building, police observed signs of a struggle and drag marks in the dust on the floor. The struggle appeared to have involved more than two people. There were several sets of footprints and some drag marks indicating that the people were pushing against each other. When the Omaha Fire Department arrived, they used a crowbar and other equipment to open the trunk where Clark was found. His hands had been tied, and there was a wire around his neck.

Later that evening, Omaha police responded to a call of suspicious activity at a convenience store. A cashier told police that customers had complained about two African-American males who were trying to get people to pay them cash for gas that the men would then purchase with a credit card. Receipts showed that at least $300 worth of gas had been charged to a credit card in Clark's name. The following day, police called the credit card company. Clark's card had been used between 4:45 and 10:45 p.m. on July 16, 2007, at four different locations.

A security officer at the convenience store testified that a customer complained to him about a man outside who was attempting to sell the use of a credit card to buy gas. The security officer saw an African-American male, about 5 feet 9 inches tall and weighing about 180 pounds, leaving the gas pumps. Before the security officer could talk to the man, he got into a white Chevrolet Corsica and left. Another African-American male was in the passenger seat. The security officer obtained the license number of the car. It was registered to Laquesha Martin, who lived in an apartment in Omaha. Police located the car at Martin's apartment. Martin was the mother of Branch's child and lived with Branch at the apartment.

About an hour after the police arrived at the convenience store, the store received at least three threatening telephone calls from someone who was upset because the police had been called. The caller threatened to "shoot up the store" and the vehicles of the cashier, the assistant manager, and the security guard.

Branch was subsequently arrested on outstanding misdemeanor warrants. Following his arrest, Branch admitted to police his involvement in the use of Clark's credit card. He said that Paul Miller had arrived at Martin's apartment with the card and that they used the card to fill cars with gas. Branch denied knowing where Miller obtained the card.

At trial, Branch admitted using Clark's credit card, but denied knowing anything about the robbery and assault of Clark. Branch claimed that on July 16, 2007, he slept until he went to pick up Martin at either 11 a.m. or 2 p.m. He was unable to recall the time because he had been to a party the

night before. He and Martin went to a bank and then to a friend's house to feed Branch's dog, returning home at either 2:30 or 4:30 p.m.

Branch said Miller arrived with a credit card and asked him to drive Miller around to fill up some gas tanks. Branch claimed it was not unusual to see Miller with credit cards because he had broken into lockers at a gym and stolen credit cards in the past. Branch understood that Miller would use the cards to fill a gas tank and then take cash from the driver.

At the first gas station, they used a credit card to fill up Martin's car. At a second gas station, they called friends and relatives to offer to fill their cars with gas. Branch said he used a credit card to fill up his brother-in-law's car, but Branch did not see a name on the card. Branch and Miller arrived at the convenience store around 4 p.m., and two of Branch's cousins came and had their gas tanks filled.

Branch said he and Miller were at the convenience store for about 2 hours and filled a number of tanks. They left when it appeared that the employees were getting suspicious. After leaving the convenience store, they went to Branch's mother's residence at about 6:15 or 6:30 p.m., stopped at the house of Miller's mother so he could change clothes, and arrived back at Martin's apartment at around 7:30 or 8 p.m.

Branch said it did not concern him that he was using a stolen credit card. When Branch saw the news report about the robbery, he did not connect it to the credit card he had been using all day. He also denied having been at Clark's business previously.

Miller pled guilty to robbery, false imprisonment, and assault in connection with the incident at Clark's business. At Branch's trial, Miller testified as a witness for the State. Miller explained the plan developed by Miller, Branch, and Michael Johnson. Branch and Miller went to Clark's business 6 days before the robbery to "scope it out." They talked to Clark and told him they wanted to store a car there. Branch said the car had big rims, and Clark asked if it could make a sharp turn around the ramp to an upper level. Clark showed them the ramp. They also asked the prices for several of the cars Clark had for sale.

The following Saturday, Branch and Miller discussed the plan for the robbery. Johnson was present and said he wanted to be included. The plan was to rob the business and take cars to sell. Miller was to be the lookout, and Johnson was to grab Clark while Branch hit him. They would use duct tape to restrain Clark's hands and legs and lay him on the floor of his office. They would each take a car and drive it around the corner and park it. They would return after dark to retrieve the cars and move them to another location. They would park the cars there until they could get titles in different names.

Miller testified that on July 16, 2007, Branch and Johnson picked up Miller in Martin's white Chevrolet Corsica. They arrived at Clark's business at around 11 or 11:15 a.m. Clark came out of his office and asked to help the three men, and Miller said they wanted to look at cars for sale. Clark started toward the back where cars were parked. When they got to the middle of the building, Johnson grabbed Clark and Branch hit him in the face. Miller left to sit in the car as a lookout. He was supposed to honk the horn if anyone came to the business. Branch came out about 10 or 15 minutes later and said he would give Miller extra money if Miller would drive the car inside the building.

As Miller drove into the building and up the ramp, he saw Clark's dentures on the floor. On the second floor, Miller saw Johnson with car speakers and an amplifier. Miller parked the Corsica and opened the trunk. He then looked at three other cars to see if there was anything valuable in them. He helped load the speakers and amplifier into the Corsica.

Branch, Miller, and Johnson drove to Johnson's house to drop off the speakers and amplifier. In the car, Miller was handed 9 or 10 car titles, a wallet containing at least one credit card in Clark's name, and car keys with identifying tags. They returned to Branch's apartment and smoked marijuana for 30 or 45 minutes. They went to the gas stations and used a credit card to fill gas tanks in exchange for cash. They obtained about $70 at the first station, $120 at the second station, and about $15 at the third. They also accepted marijuana in place of cash.

At the convenience store, they used a credit card in Clark's name to fill every car present. When employees inside began watching them and the security guard came outside, Branch and Miller got back into the Corsica and Johnson walked off. Branch and Miller drove to the residence of Branch's mother. While there, Branch used the telephone in a back room, and Miller heard him yelling at the convenience store employees, telling them they should not have called the police. Miller said he did not know Clark had been placed in the trunk of a car until he saw the report on the news.

The jury found Branch guilty of robbery and kidnapping. He was sentenced to a term of 40 to 50 years in prison for the robbery and to a term of life to life in prison for the kidnapping, to be served concurrently. Branch appeals.

ASSIGNMENTS OF ERROR

Branch assigns three errors: (1) The district court erred in overruling Branch's motion to dismiss and allowing the case to go to the jury, (2) the evidence was insufficient to sustain guilty verdicts for kidnapping and robbery, and (3) the sentence for robbery was excessive.

ANALYSIS

Motion to Dismiss and Submission of Case to Jury

[4] A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

At the close of the State's evidence, Branch moved to dismiss, arguing that the evidence did not sustain a prima facie case to go forward. The court overruled the motion, and Branch proceeded to present evidence. Thus, he has waived the right to challenge the court's ruling on the motion to dismiss.

Sufficiency of Evidence

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Davis*, *ante* p. 161, 762 N.W.2d 287 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

The evidence in this case is a combination of direct and circumstantial. Miller testified that Branch was involved in the planning and execution of the crime. Miller said he and Branch went to Clark's business 6 days prior to the robbery to "scope it out." On the day of the robbery, Miller saw Branch hit Clark in the face. Miller was handed Clark's wallet and went with Branch to several gas stations to use the credit card in Clark's name.

Miller testified that the original plan was to steal cars, but ultimately, they took personal property belonging to Clark and car titles. On cross-examination, Miller admitted that he had not given consistent statements about the incident. However, Miller identified Branch as a participant in the crimes. The physical evidence showed that Clark was bound with duct tape and placed in a locked car trunk.

Branch testified in his own behalf and admitted his involvement in the use of a credit card taken from Clark during the robbery. However, his recollection of the events of July 16, 2007, was sketchy. Branch could not state whether he picked up Martin at 11 a.m. or 2 p.m. He stated that he did not know whether they returned home at 2:30 or 4:30 p.m., but then he said he and Miller left the apartment around 2 or 3 p.m. He said they arrived at the convenience store around 4 p.m. and were there for 2 hours.

Branch admitted that he used a credit card to purchase gas for others, but he claimed he never looked at the card or saw

Clark's name on it. It did not concern Branch that he was using a stolen credit card, and he claimed that he did not connect the credit card to the robbery when he heard about it on the news.

Branch testified that he was about 5 feet 9 or 10 inches tall and weighed about 145 or 150 pounds at the time of the robbery. The security guard at the convenience store testified that one of the African-American males he saw drive away in the Corsica was about 5 feet 9 inches tall and weighed about 180 pounds. Miller testified that he was 6 feet tall and weighed about 235 pounds.

Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. See *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008). An appellate court does not reweigh the evidence in reviewing a criminal conviction. *Id*. A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Id*.

Clark was grabbed from behind and beaten. He was bound and placed in a locked car trunk. Clark testified he was in the trunk for hours. He sustained serious injuries which required that he be placed in a drug-induced coma for nearly 3 weeks.

Neb. Rev. Stat. § 28-313 (Reissue 2008) defines kidnapping: "A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to . . . [t]errorize him or . . . [c]ommit a felony." Robbery occurs when a person, with the intent to steal, "forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever." Neb. Rev. Stat. § 28-324 (Reissue 2008). Clark was beaten and abducted so that the perpetrators could steal from his business. The evidence supports the fact that the crimes of kidnapping and robbery were committed.

[5] On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may

an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008). From the evidence presented, the jury found beyond a reasonable doubt that Branch committed the crimes of kidnapping and robbery. Viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

Excessive Sentence

Branch also claims that the sentence for robbery was excessive. Robbery is a Class II felony and is punishable by a sentence of 1 to 50 years in prison. § 28-324; Neb. Rev. Stat. § 28-105 (Reissue 2008). Branch was sentenced to a term of 40 to 50 years in prison. He argues that the sentence given for the robbery was excessive, because the court also considered the violent nature of the kidnapping in imposing the sentence. Because kidnapping requires a mandatory life sentence, Branch claims that violence had already been factored into the sentence and that, therefore, the term imposed for robbery was excessive.

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008). Although Branch had no prior criminal history, Clark was abducted, violently assaulted, and incurred great pain and suffering. The district court did not abuse its discretion in imposing the sentence.

CONCLUSION

The evidence is sufficient to support the verdicts. The sentence for robbery was not an abuse of discretion. The judgment of conviction is affirmed, and the sentences are affirmed.

Affirmed.

Miller-Lerman, J., not participating.

STATE OF NEBRASKA EX REL. ADAMS COUNTY HISTORICAL SOCIETY, APPELLANT AND CROSS-APPELLEE, V. NANCY KINYOUN, APPELLEE AND CROSS-APPELLANT.

765 N.W.2d 212

Filed May 15, 2009. No. S-08-339.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Records: Mandamus.** Nebraska's public records statutes outline the procedure to be followed if a request for public records is denied. Under Neb. Rev. Stat. § 84-712.03 (Reissue 2008), any person denied any rights granted under the public records statutes may either file for a writ of mandamus in the district court with jurisdiction or petition the Attorney General to review the matter.
3. **Actions: Records: Proof: Appeal and Error.** Neb. Rev. Stat. § 84-712.03 (Reissue 2008) provides that in any suit filed under the public records statutes, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper. The court shall determine the matter de novo, and the burden is on the public body to sustain its action.
4. **Records.** Under Neb. Rev. Stat. § 84-712(1) (Reissue 2008), citizens of the state have the right to examine and make copies of most public records.
5. **Records: Words and Phrases.** Public records include all records and documents, regardless of physical form, of or belonging to this state; any county, city, village, political subdivision, or tax-supported district in this state; or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.
6. **Records.** Under Neb. Rev. Stat. § 84-712.05(2) (Reissue 2008), medical records, other than records of births and deaths, may generally be withheld from the public.

Appeal from the District Court for Adams County: TERRI S. HARDER, Judge. Writ of mandamus granted.

Thomas R. Burke, of Davis Wright Tremaine LLP, and Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Paul M. Kaufmann, Special Assistant Attorney General, for appellee.

Sarah Stilwill, of Peters Law Firm, P.C., and Lucy A. Dalglish, Corinna J. Zarek, and Hannah Bergman, of Reporters

Committee for Freedom of the Press, for amici curiae Reporters Committee for Freedom of the Press et al.

Shane E. Perkins, of Whelan & Scherr, for amici curiae Lee Wigert et al.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

HEAVICAN, C.J.

INTRODUCTION

The Adams County Historical Society (ACHS) brings this writ of mandamus to compel Nancy Kinyoun, custodian of records at the Hastings Regional Center (HRC), to release the names of 957 people buried in the adjoining cemetery. ACHS claims that the information is a public record as defined by Neb. Rev. Stat. § 84-712.01 (Reissue 2008) and that Kinyoun did not have sufficient reason to deny access to that information. Kinyoun and the Department of Health and Human Services (DHHS) claim the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)[1] and Nebraska's public records statutes prevent the release of this information. Kinyoun and DHHS claim this issue is inappropriate for a writ of mandamus.

We find that this action is appropriate for a writ of mandamus and that the information sought is a public record as defined by § 84-712.01. We therefore grant the request of ACHS and order Kinyoun to release the requested information in conformity with our opinion below.

FACTS

The facts of this case are relatively straightforward. HRC was created in 1887 as an "asylum for the incurable insane."[2] Currently, HRC is a state-run institution operated by DHHS. HRC burial records date back to 1909 and indicate that the last burial occurred there in 1959. Graves are marked only by

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[1] 42 U.S.C. § 1320d et seq. (2006).

[2] Gen. Stat. ch. 48, § 1, p. 475 (1887).

patient numbers, and the burial records consist of handwritten journals listing patient name, date of death, and medical record number. The records also contain maps with the graves and patient numbers which can be compared to the records in the journals.

ACHS is a nonprofit organization dedicated to collecting and preserving the history of Adams County, Nebraska, and the surrounding area. ACHS requested information from Kinyoun consistent with its mission to collect and preserve historical data. Kinyoun denied the request, citing state and federal privacy laws. ACHS requested that the Nebraska Attorney General's office review the matter pursuant to Neb. Rev. Stat. § 84-712.03 (Reissue 2008) and recommend that Kinyoun and DHHS reverse their position. The Attorney General, however, agreed with the position taken by Kinyoun and DHHS.[3] In response, ACHS filed a mandamus action pursuant to § 84-712.03. A hearing was held in Adams County District Court, and Kinyoun's decision not to release the records was upheld. We moved the case to our docket to determine whether the information sought is a public record as defined by § 84-712.01.

ASSIGNMENTS OF ERROR

ACHS assigns that the district court erred when it (1) excluded certain pieces of evidence, based on relevancy, hearsay, and foundational grounds, and (2) upheld Kinyoun's decision to deny access to the records. Kinyoun has cross-appealed, alleging that mandamus is not an appropriate remedy in this case.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[4]

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[3] Att'y Gen. Op. No. 04018 (Apr. 20, 2004).

[4] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

ANALYSIS

Resolution of this case revolves around the interpretation of Nebraska's public records statutes in conjunction with HIPAA and our state's privacy provisions. In essence, the question is whether the records sought by ACHS can be classified as public records under § 84-712.01 and whether HIPAA and/or our state's privacy provisions bar release. Because the issue is one of statutory interpretation, we review the matter de novo and need not reach ACHS' claims that evidence was improperly ruled inadmissible. However, we first address Kinyoun's claim that this action is not appropriate for a writ of mandamus.

Can ACHS Request Writ of Mandamus in This Matter?

Traditionally, "mandamus" was a law action and was defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.[5] Kinyoun claims that under the traditional definition of mandamus, release of the information is not purely ministerial. Kinyoun also claims that ACHS has no clear right to the names requested, that she has no duty to release the names, and that ACHS has other remedies available.

[2,3] Nebraska's public records statutes outline the procedure to be followed if a request for public records is denied, however, and provide the appropriate relief. Under § 84-712.03, "[a]ny person denied any rights granted" under the public records statutes may either file for a writ of mandamus in the district court with jurisdiction or petition the Attorney General to review the matter. The statute goes on to provide that in any suit filed under the public records statutes, "the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such

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[5] *State ex rel. Johnson v. Gale*, 273 Neb. 889, 734 N.W.2d 290 (2007).

other equitable relief as may be proper. The court shall determine the matter de novo, and the burden is on the public body to sustain its action."

We note that ACHS attempted to follow both procedures outlined under § 84-712.03, first by requesting the Attorney General to review Kinyoun's decision, then by petitioning the district court for a writ of mandamus after the Attorney General upheld Kinyoun's decision. ACHS has therefore exhausted its statutory remedies. This writ of mandamus is properly before us. We next turn to the question of whether HIPAA and/or our privacy laws preclude release of these records.

HIPAA's Application to HRC's Records

Kinyoun claims that HIPAA precludes the release of burial records because such records constitute "protected health information."[6] HIPAA was enacted to safeguard medical information and to "improve the efficiency and effectiveness of the health care system by facilitating the electronic exchange of information with respect to financial and administrative transactions carried out by health plans, health care clearinghouses, and health care providers."[7] Under 42 U.S.C. § 1320d(6),

> [t]he term "individually identifiable health information" means any information, including demographic information collected from an individual, that—
>
> (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and—
>
> (i) identifies the individual; or
>
> (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

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[6] Brief for appellee at 10.

[7] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14776 (Mar. 27, 2002).

Kinyoun claims, and we agree, that HRC is an entity covered by HIPAA and that the burial records constitute the "individually identifiable health information" that HIPAA was designed to protect.[8] And, under 45 C.F.R. § 164.502(f) (2008), "[a] covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual." Therefore, HIPAA and its attendant regulations do apply to deceased individuals.

Under the Code of Federal Regulations governing HIPAA and the dissemination of private medical information, however, there is an exemption for information required to be released by law, and 45 C.F.R. § 164.512 (2008) defines "[u]ses and disclosures for which an authorization or opportunity to agree or object is not required." Subpart (a)(1) of that section defines the standard for uses and disclosures and states that those disclosures may be made to the extent required by law, if in compliance with and limited to the relevant requirements of such law. "Required by law" is defined under 45 C.F.R. § 164.103 (2008) as "a mandate contained in law that compels an entity to make a use or disclosure of protected health information and that is enforceable in a court of law." This provision includes statutes and regulations that require the production of the information, such as Nebraska's public records statutes.[9]

[4-6] Nebraska, like the federal government and many other states, has broad public records laws that generally provide open access to governmental records. Under Neb. Rev. Stat. § 84-712(1) (Reissue 2008), citizens of the state have the right to examine and make copies of most public records. "Public records" include "all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state,

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[8] Brief for appellee at 9.

[9] See, e.g., *Abbott v. Texas Dept. of Mental Health*, 212 S.W.3d 648 (Tex. App. 2006); *State ex rel. Enquirer v. Daniels*, 108 Ohio St. 3d 518, 844 N.E.2d 1181 (2006); HIPAA Frequent Questions, Permitted Use and Disclosure, Disclosures Required by Law, http://www.hhs.gov/hipaafaq/permitted/require/506.html (last visited May 12, 2009).

or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing."[10] As a state-supported institution, HRC is subject to the public records statutes. Under Neb. Rev. Stat. § 84-712.05(2) (Reissue 2008), however, "[m]edical records, *other than records of births and deaths*," may generally be withheld from the public. (Emphasis supplied.) ACHS argues that the records sought in this case are records of deaths as defined by the statute.

Kinyoun counters this argument by claiming that the records ACHS is requesting are part of the deceased patients' medical records. She contends that because all of those patients buried in the HRC cemetery had been patients at HRC when they died, releasing their names is equivalent to releasing medical records. For that reason, Kinyoun claims, the burial information is part of the medical record that HRC is required to keep, and HIPAA prohibits the release of the medical records because they constitute "individually identifiable health information" as a result.[11]

We do not find Kinyoun's argument persuasive, however, and we find that the records sought are "records of . . . deaths."[12] First, the information sought by ACHS is more limited than the information available on a death certificate. Death certificates are available to the public. Neb. Rev. Stat. § 71-605(2) (Cum. Supp. 2008) requires that death certificates include the Social Security number of the deceased, as well as "the cause, disease, or sequence of causes ending in death"; the death certificate entered into the record as an exhibit in this case shows the "Place of Burial or Removal."

Second, those patients admitted to HRC were admitted for a variety of reasons. The record reflects that patients were admitted to HRC for issues relating to substance abuse, senility and dementia relating to old age, various psychotic disorders, "mental deficiencies," and other undiagnosed mental disorders. The fact that the deceased persons were treated at

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[10] § 84-712.01(1).

[11] See 42 U.S.C. § 1320d(6).

[12] See § 84-712.05(2).

HRC does not indicate the nature of their diagnoses, or even the causes of death—information routinely released via death certificates. Furthermore, the records sought by ACHS do not include diagnosis or treatment information, but instead are limited to the names of the deceased and the locations of burial.

ACHS cites two cases from other states in which courts have allowed the release of information in spite of HIPAA due to the application of state open records laws.[13] Kinyoun, in contrast, has not cited any cases which address the intersection of HIPAA with state or federal open records laws. Although the cases ACHS cited are not directly on point, the cases are instructive, because the information sought did not identify individuals. Both cases demonstrate that HIPAA can and does give way to state laws requiring disclosure of certain kinds of information.[14] Therefore, in this situation, HIPAA does not bar release of the information, and Kinyoun has not met her burden to establish a reason to withhold the burial records.

Nebraska Statutes Do Not Prevent Release of Records

Kinyoun also argues that the burial records should remain private under various Nebraska statutes. Under the Nebraska Mental Health Commitment Act's section on records, Neb. Rev. Stat. § 71-961 (Cum. Supp. 2008), all records of any mental health patient are to remain confidential unless otherwise provided by law. Neb. Rev. Stat. § 83-109 (Reissue 2008) states that "[a] record of every patient or resident of every institution shall be kept complete from the date of his or her entrance to the date of his or her discharge or death . . . ." Neb. Rev. Stat. § 27-504(3) (Reissue 2008) states that the physician-patient privilege "may be claimed by the patient or client . . . or by the personal representative of a deceased patient or client."

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[13] See, e.g., *Abbott v. Texas Dept. of Mental Health*, *supra* note 9; *State ex rel. Enquirer v. Daniels*, *supra* note 9.

[14] *Id.*

None of these statutes are applicable to the records in this case, however, for the same reasons that HIPAA does not apply. Sections 27-504(3), 71-961, and 83-109 all deal with medical records or patient histories. As already stated, we find that the records requested by ACHS are records of deaths, and § 84-712.05(2) specifically allows release of "records of births and deaths." Because we have found that these records are records of deaths, they are not prohibited from release under § 27-504(3), § 71-961, or § 83-109.

CONCLUSION

Although HIPAA prevents the release of individually identifiable medical information, it also provides for release of information when required by state law. Nebraska's public records statutes require that medical records be kept confidential, but exempt birth and death records from that requirement. Our privacy laws also apply to medical records and patient histories, but not to records of deaths. The records sought by ACHS are records of deaths and therefore are public records. Kinyoun is hereby ordered to release the information under the public records statutes.

WRIT OF MANDAMUS GRANTED.

MILLER-LERMAN, J., participating on briefs.

WRIGHT, J., not participating.

TEX R. HARVEY ET AL., APPELLANTS AND CROSS-APPELLEES, V. NEBRASKA LIFE AND HEALTH INSURANCE GUARANTY ASSOCIATION, APPELLEE AND CROSS-APPELLANT.

765 N.W.2d 206

Filed May 15, 2009. No. S-08-520.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.

3. **Statutes.** The meaning of a statute is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. ____: ____: ____. To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language.
7. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed.

David D. Begley, P.C., L.L.O., for appellants.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

Steven D. Davidson, of Baird Holm, L.L.P., J. Brett Busby and David T. McDowell, of Bracewell & Giuliani, L.L.P., and Lisa Tate for amicus curiae American Council of Life Insurers.

Timothy R. Engler, of Harding & Shultz, P.C., L.L.O., and, of Counsel, Charles T. Richardson and Scott D. Himsel, of Baker & Daniels, L.L.P., and William P. O'Sullivan for amicus curiae National Organization of Life and Health Insurance Guaranty Associations.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Future First Financial Group, Inc. (Future First), was a broker of viatical settlements. Viatical settlements are the sale or assignment of either the death benefit or ownership or any portion of the insurance policy or certificate of insurance.[1]

[1] Neb. Rev. Stat. § 44-1102(14) (Reissue 2004).

Each of the named plaintiffs-appellants (hereinafter plaintiffs) invested in viatical settlements from Future First by entering into purchase request agreements (PRA's). Although the PRA's required plaintiffs to be named as life insurance policy beneficiaries, Future First failed to do so. The Florida Department of Insurance revoked Future First's viatical settlement provider license, and Future First was placed into judicial conservatorship.

Plaintiffs filed this declaratory judgment action seeking a declaration of the rights of the parties regarding liability arising from the PRA's. The question presented is whether, under the Nebraska Life and Health Insurance Guaranty Association Act (the Act),[2] Future First is a "member insurer."[3] We conclude that because Future First was not licensed by the Nebraska Department of Insurance, the Nebraska Life and Health Insurance Guaranty Association (Guaranty Association) is not obligated to guarantee the PRA's.

FACTS

The defendant-appellee, Guaranty Association, is a nonprofit unincorporated association of insurance companies created by the Act to provide protection to Nebraska residents who own or are beneficiaries of statutorily covered life insurance, health insurance, or annuity contracts. Generally, as limited by the Act, the Guaranty Association guarantees payment of benefits and continuation of coverage when an insurer becomes insolvent.[4] Future First was a Florida corporation which has never been licensed by the Nebraska Department of Insurance to conduct business in Nebraska and has never paid dues or assessments to the Guaranty Association.

Future First was engaged in the business of providing or brokering viatical settlements. The parties define a viatical settlement as "a commercial transaction in which a terminally ill person insured by an existing life insurance policy sells the policy at a discount from its face value based upon the insured's

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[2] Neb. Rev. Stat. §§ 44-2701 to 44-2720 (Reissue 2004).

[3] See § 44-2702(8).

[4] See § 44-2701.

life expectancy." Nebraska law defines a viatical settlement contract as the sale or assignment of either "the death benefit or ownership or any portion of the insurance policy or certificate of insurance."[5]

Plaintiffs, all of whom are Nebraska residents, each entered into contracts to invest in viatical settlements by executing PRA's with Future First. Plaintiffs executed PRA's in favor of Future First specifying the rate of return they desired for their investment based on the duration of the "program" they chose. The PRA's advised plaintiffs that "life expectancy may vary, and there is no guarantee that the insurance policy purchased will pay a death benefit" to the purchaser within the time period selected by the purchaser. (Emphasis omitted.) Fidelity Viatical Trust was named as the owner of the life insurance policies in the PRA's.

The PRA's also stated that plaintiffs "must be named as either an absolute, irrevocable, non-transferable or direct beneficiary." With the exception of a list of names set forth in the stipulated record, however, no plaintiffs were contractually designated as the beneficiaries of any life insurance policy purchased by Future First.

Future First eventually "collapsed due to a combination of fraud, new medical developments and [policy sellers'] not dying according to the expected schedule."[6] The Florida Department of Insurance revoked Future First's viatical settlement provider license, and Future First was placed into judicial conservatorship.

Plaintiffs filed a declaratory judgment action seeking a declaration of the rights and duties of the parties under the PRA's. Both sides filed motions for partial summary judgment on the issue of liability only. The district court initially granted plaintiffs' motion for partial summary judgment on the issue of liability and overruled the Guaranty Association's motion for partial summary judgment. The court initially found that Future First was a "member insurer" for purposes of the Act and that the PRA's were "supplemental contracts"

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[5] § 44-1102(14).

[6] Brief for appellants at 11.

under § 44-2703(2)(a), effectively ordering the Guaranty Association to provide coverage to plaintiffs for their investment losses.

The Guaranty Association filed a motion to reconsider the partial summary judgment ruling, and the district court vacated its previous ruling. Although the court declined to alter its ruling that Future First was a "member insurer" and that the PRA's were "supplemental contracts" for purposes of the Act, the court held that the exclusion in § 44-2703(2)(b)(i) precludes coverage of plaintiffs' claims. That section states that the Act does not apply to "[a]ny portion of any policy or contract not guaranteed by the insurer or under which the risk is borne by the policy or contract holder."[7] The court concluded that the PRA's require plaintiffs to bear risks and that therefore, the PRA's are excluded from the Act's coverage. Plaintiffs appeal, and the Guaranty Association cross-appeals.

ASSIGNMENTS OF ERROR

Plaintiffs assign that the district court erred in (1) deciding that the contracts and transactions were exempt from coverage by § 44-2703(2)(b)(i), (2) granting the Guaranty Association's motion for summary judgment, and (3) reconsidering and reversing the result which had previously granted plaintiffs' motion for partial summary judgment.

On cross-appeal, the Guaranty Association assigns that the district court erred in holding that (1) Future First is a "member insurer" for purposes of the Act and (2) the PRA's are "supplemental contracts" for purposes of the Act.

STANDARD OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, an appellate court views the

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[7] § 44-2703(2)(b)(i).

[8] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[9]

[3,4] The meaning of a statute is a question of law.[10] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[11]

ANALYSIS

We first address an issue raised by the Guaranty Association's cross-appeal, as our resolution of the issue is dispositive of this appeal. On cross-appeal, the Guaranty Association contends that Future First is not a "member insurer" for the purposes of the Act. Therefore, the Guaranty Association argues, it has no obligation to guarantee the PRA's issued by Future First. The Guaranty Association asserts that the Act requires the association to protect only insurance products issued by "member insurers" and that treating Future First as a "member insurer" is inconsistent with the underlying purpose of the Act.

The stated purpose of the Act is to protect resident policy owners and insureds against failure of an insolvent or financially impaired insurer to perform its contractual obligations and to assist in the detection and prevention of insurer insolvencies.[12] In order to provide this protection, the Act creates an association of insurers, the Guaranty Association, that enables the guarantee of payment of benefits and continuation of coverages, as limited in the Act.[13] When a "member insurer" becomes insolvent, the Guaranty Association's duty is to "[g]uarantee, assume, or reinsure, or cause to be guaranteed, assumed, or

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[9] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

[10] *Ahmann v. Correctional Ctr. Lincoln*, 276 Neb. 590, 755 N.W.2d 608 (2008).

[11] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

[12] § 44-2701; *Nebraska Life & Health Ins. Guar. Assn. v. Dobias*, 247 Neb. 900, 531 N.W.2d 217 (1995).

[13] § 44-2701(1).

reinsured, all the covered policies of the impaired [or insolvent] insurer."[14] The funds required to carry out the powers and duties of the association are obtained by assessments levied against member insurers.[15] Essentially, the Guaranty Association pays or guarantees the insurance benefits that the insolvent member insurer is no longer able to pay, up to the statutory coverage limits.

In order to transact insurance business in Nebraska, a foreign insurance company must obtain a certificate of authority from the Nebraska Department of Insurance.[16] Insurers become members of the Guaranty Association as a condition of their authority to transact business in Nebraska, and the Guaranty Association operates under the direct supervision of the Nebraska Director of Insurance.[17] The Act defines "member insurer" as "any person authorized to transact in this state any kind of insurance provided for under section 44-2703."[18] The insurance provided for under that section generally includes direct nongroup life, health, or annuity policies or contracts and supplemental contracts to any of those policies. But the Act specifically states that it shall not apply to "any [such] policy or contract issued by any person, corporation, or organization which is not licensed by the Department of Insurance under Chapter 44" of the Nebraska Revised Statutes.[19]

Here, the parties stipulated that Future First is not authorized and has never possessed a certificate of authority from the Nebraska Department of Insurance authorizing it to transact business in Nebraska. Although Future First was licensed by the Florida Department of Insurance as a viatical settlement provider, Future First was not authorized to transact insurance business in Nebraska. Therefore, Future First was not a member insurer under the Act and the viatical

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[14] § 44-2707(1)(a). Accord § 44-2707(2)(a).

[15] § 44-2708.

[16] Neb. Rev. Stat. § 44-135 (Reissue 2004).

[17] § 44-2705.

[18] § 44-2702(8).

[19] § 44-2703(2)(b)(xiii).

settlements it sold are specifically excluded from coverage under the Act, because they were issued by a business that was not licensed by the Nebraska Department of Insurance under chapter 44.

[5,6] When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[20] To determine the legislative intent of a statute, a court generally considers the subject matter of the whole act, as well as the particular topic of the statute containing the questioned language.[21] Plaintiffs admit that Future First was never a member of the Guaranty Association and never paid dues or assessments to the association. In light of the fact that Future First was never a member insurer, Future First investors may not benefit from a system designed to guarantee a continuation of coverage of member insurers. Based on the undisputed evidence, we conclude as a matter of law that Future First is not a "member insurer" as defined by the Act, and because it was not authorized to transact business in Nebraska, the PRA's are specifically excluded from the Act. Therefore, the Guaranty Association has no obligation to guarantee the PRA's.

Plaintiffs argue that Future First is a member insurer because viatical settlements are "supplemental contracts" for the distribution of policy or contract proceeds,[22] and according to plaintiffs, Future First was able to legally sell viatical settlements in Nebraska by virtue of being licensed to do so in Florida. But that, even if true, is beside the point. The issue in this case is not whether Future First's sale of the PRA's was "legal." The issue is whether the PRA's are guaranteed by the Act. The Act, as explained above, does not operate to generally guarantee every product that can legally be sold in Nebraska. Instead, it is intended to guarantee insurance products that are sold to Nebraska residents by insurers that are authorized

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[20] *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[21] *Id.*

[22] See § 44-2702(15).

to do business here and therefore are member insurers of the Guaranty Association. Future First was not, and its PRA's are not covered by the Act.

Our conclusion that Future First is not a "member insurer" under the Act is dispositive of this appeal, and therefore, we need not address the Guaranty Association's remaining assignments of error on cross-appeal or plaintiffs' assignments of error.

CONCLUSION

[7] We conclude that the district court erred in concluding that Future First was a "member insurer" under the Act. But where the record adequately demonstrates that the decision of the trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.[23] Based on the foregoing reasons, we affirm the district court's order granting the Guaranty Association's motion for summary judgment.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.
WRIGHT, J., not participating.

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[23] *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

BERRINGTON CORPORATION, DOING BUSINESS AS ELDORADO HILLS GOLF CLUB, APPELLANT, V. STATE OF NEBRASKA DEPARTMENT OF REVENUE AND DOUGLAS A. EWALD, NEBRASKA STATE TAX COMMISSIONER, APPELLEES.

765 N.W.2d 448

Filed May 15, 2009. No. S-08-580.

1. **Administrative Law: Final Orders: Appeal and Error.** Under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008), an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Taxation: Presumptions: Proof.** An exemption from taxation is never presumed, and the burden of showing entitlement to a tax exemption is on the party claiming the exemption.
5. **Estoppel: Words and Phrases.** Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his own deeds, acts, or representations.
6. **Political Subdivisions: Estoppel: Equity.** The State and its political subdivisions can be equitably estopped, but the doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.
7. **Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

David L. Buelt, George T. Blazek, and Carlos E. Noel, of Ellick, Jones, Buelt, Blazek & Longo, for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

Under Nebraska law, admission charges are subject to sales tax, but membership dues are not.[1] The principal issue in this

[1] See, Neb. Rev. Stat. § 77-2703 (Cum. Supp. 2004); 316 Neb. Admin. Code, ch. 1, §§ 044.01 and 044.02 (1993).

case is whether amounts paid by members of the Eldorado Hills Golf Club (Eldorado Hills) in Norfolk, Nebraska, to the corporation which operates that facility are admission charges or membership dues under applicable regulatory definitions.

BACKGROUND

Berrington Corporation (Berrington) is an S corporation with offices in Omaha, Nebraska. It operates Eldorado Hills, an 18-hole golf course and club with a related restaurant, lounge, snack bar, and golf shop located in Norfolk. The general public pays green fees to play the golf course, and Eldorado Hills offers family, individual, senior, student, and other categories of "memberships."

At all relevant times, Berrington's shareholders were Eric and Anne Waddington and Mark and Marjorie Mooberry. The Waddingtons owned 70 percent of Berrington's stock, and the Mooberrys owned the remaining 30 percent. No other person held an equity or ownership interest in the corporation. The Waddingtons and the Mooberrys were the sole members of Berrington's board of directors. No person other than these four individuals participated in the election of the board of directors during the audit period. Eric Waddington was the president and treasurer of the corporation, and Mark Mooberry was the secretary. Mark Mooberry was given authority by Berrington's board of directors to oversee and manage all aspects of the operation of Eldorado Hills. All operating obligations and expenses were paid from a bank account held by Berrington. Only Eric Waddington and Mark Mooberry had signatory authority on the account. Berrington adopted corporate bylaws, which could only be amended by action of the shareholders.

Persons who paid membership dues voted for and elected other members to serve on an advisory board, which served as a means by which persons considered to be members of Eldorado Hills could communicate with Berrington on various issues involving the operation of the golf course and related facilities. The advisory board was unincorporated and had no operating bylaws or constitution. It did, however, participate at least in part in the adoption and amendment of the Eldorado Hills' rules and regulations.

The advisory board, on behalf of the members, also worked closely with Berrington with respect to various issues pertaining to the operation of Eldorado Hills. The advisory board participated in the budget process, helped set the amounts for membership dues, and assisted in the creation of the schedule for the golf course. The advisory board also assisted Berrington in determining the sequence and pace of improvements to the golf course and facilities and helped maintain and beautify the golf course. The advisory board influenced Berrington's decision to permit member-owned golf carts, despite the fact that the use of such carts affected Berrington's revenue from cart rentals. The advisory board was involved in recruitment and retention of members and collection of delinquent membership dues.

After conducting an audit, the Nebraska Department of Revenue issued a deficiency determination to Berrington for the period March 1, 2002, through February 28, 2005. Berrington was assessed $40,894.88 in back taxes, interest in the amount of $3,925.12, and a penalty of $4,309.92, for a total of $49,129.92. The major component of the deficiency was the auditor's determination that membership dues received by Berrington were actually admission charges which were subject to sales tax. Berrington filed a petition for redetermination, protesting the deficiency determination and asserting a claim for refund of sales taxes it had paid on snack food not intended for consumption on its premises.

After an evidentiary hearing conducted by a Department of Revenue hearing officer, the Tax Commissioner affirmed the deficiency assessment, reasoning that the "memberships" were actually taxable admissions because members of Eldorado Hills had no authority to hold office in Berrington, to vote for officers of Berrington, or to change the constitution and bylaws of Berrington. The commissioner rejected Berrington's claim that the department was equitably estopped from taxing Eldorado Hills memberships, as Berrington had contended that the department had taken an inconsistent position in a 1994 audit of an Omaha golf club in which Rick Waddington had held an ownership interest. Finally, the commissioner denied Berrington's claim for a refund of sales tax

on snack foods, finding that there was no showing that the snack foods were intended to be consumed off the premises of Eldorado Hills.

Pursuant to the judicial review provisions in the Administrative Procedure Act,[2] Berrington petitioned for review in the district court for Lancaster County. That court affirmed the reasoning and decision of the Tax Commissioner, and Berrington filed this timely appeal. We moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

ASSIGNMENTS OF ERROR

Berrington assigns, restated and consolidated, that the district court erred in finding (1) that the membership dues were admission charges subject to sales tax, (2) that equitable estoppel does not apply to the facts of this case, and (3) that Berrington was not entitled to a refund for sales tax it paid on snack food.

STANDARD OF REVIEW

[1,2] Under the Administrative Procedure Act,[4] an appellate court may reverse, vacate, or modify a district court's judgment or final order for errors appearing on the record.[5] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[6]

[3] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court

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[2] See Neb. Rev. Stat. § 84-917 (Reissue 2008).

[3] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[4] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008).

[5] *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008); *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

[6] *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009); *Nothnagel v. Neth*, 276 Neb. 95, 752 N.W.2d 149 (2008).

has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[7]

ANALYSIS

Are Memberships Taxable?

We note that the applicable tax statutes have been amended without substantive change during the time period covered by the audit; thus, we will cite to the most current version in effect on February 28, 2005, which is the end of the audit period.[8] During the years covered by the Berrington audit, Nebraska imposed a sales tax on "gross receipts,"[9] defined to include "the sale of admissions which means the right or privilege to have access to or to use a place or location."[10] Although the statutory language was silent on the taxability of "memberships," the Department of Revenue duly adopted and promulgated regulations which distinguished taxable admissions from nontaxable memberships as follows:

> 044.01 The term "admission", as used herein, means the right or privilege to have access to or use a place or location where amusement, entertainment or recreation is provided. The gross receipts from the sale of admissions, including surcharges, are subject to sales tax. This includes season or subscription tickets for specific occasions or for multiple occasions, either limited or unlimited during a period of time.
>
> 044.02 The term "membership", as used herein, means having *all the participation rights of belonging to an organization which shall include, but are not necessarily limited to, the voting for officers, the holding of office, and the ability to change the constitution and bylaws*. The payment or receipt of membership dues [is] exempted from the sales and use tax. Membership shall not include

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[7] *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006).

[8] See, *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005); *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

[9] § 77-2703(1).

[10] Neb. Rev. Stat. § 77-2701.16(11) (Cum. Supp. 2004).

> any charge that is intended to allow admission to a place or event, or series of events, rather than to confer participation rights.[11]

Applying these regulations, the department concluded that memberships sold by Eldorado Hills were taxable as "admissions," because the memberships did not grant concurrent rights to vote for officers of Berrington, to hold office in Berrington, or to change the constitution and bylaws of Berrington. Berrington contends that the focus of this inquiry should be on the members' relationship with Eldorado Hills, not with Berrington. Berrington contends, restated, that because members, through their advisory board, have a close working relationship with Eldorado Hills management and are able to influence policies and operations, they have participation rights which distinguish their memberships from taxable admission fees.

The key language of the applicable regulation is "all the participation rights of belonging to an organization." The "organization" in this case can only be Berrington, the recipient of revenue generated by the operation of Eldorado Hills and the party liable for any sales tax payable on such revenue. Eldorado Hills has no separate legal organization or identity distinct from Berrington. The advisory board has no separate legal identity and is not the recipient of membership dues. Thus, the question turns on whether persons considered "members" of Eldorado Hills have participation rights with respect to Berrington. It is clear from the record that they do not. The payment of "membership" dues does not entitle a member to hold office in Berrington, vote for officers of Berrington, or change Berrington's organizational documents. The members' collective ability to influence management decisions through the advisory board does not constitute a *right* to participate in the legal or business affairs of Berrington. While it is no doubt a sound business practice for Berrington to accommodate the wishes of Eldorado Hills members whenever possible, it is under no legal obligation to do so. Persons paying membership dues acquire certain rights to use the golf course and facilities

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[11] 316 Neb. Admin. Code, ch. 1, §§ 044.01 and 044.02 (emphasis supplied).

at Eldorado Hills, but they acquire no legally cognizable participation rights with respect to Berrington. For example, members whose dues give them the right to use the golf course might unanimously agree that certain improvements should be made to the course, but they would have no right or power to require Berrington to undertake the improvements if it chose not to do so.

Berrington argues that we should consider a 2005 amendment to § 77-2701.16(11) as an aid to interpreting the regulation upon which the department based its determination. The amendment added in part the following language to the statute: "An admission includes a membership that allows access to or use of a place or location, but which membership does not include the right to hold office, vote, or change the policies of the organization."[12] This amendment did not become effective until after the audit period at issue in this case, and we therefore do not consider it. The regulation which was properly adopted and filed at the time of the audit period had the effect of statutory law[13] and constitutes the substantive law applicable to this case. Under its plain language, the amounts paid by Eldorado Hills members to Berrington constitute taxable admission charges, not exempt membership dues.

[4] Berrington also argues that the audit was arbitrary and capricious and that the department and the district court failed to independently analyze the pertinent facts, thereby placing upon Berrington "the burden to prove the assessment wrong."[14] We need not comment upon the manner in which the audit was conducted, because it is clear that a full factual record was made upon Berrington's petition for redetermination, and it is likewise clear that both the department and the district court conducted a reasoned analysis of the issues presented based upon the facts included in that record. Moreover, there is no merit to Berrington's argument that some deficiency in the audit unfairly shifted the burden of proof. Under the applicable regulation, "[t]he payment or receipt of membership

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[12] 2005 Neb. Laws, L.B. 216, § 4.

[13] See *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, *supra* note 8.

[14] Brief for appellant at 26.

dues [is] exempted from the sales and use tax."[15] An exemption from taxation is never presumed, and the burden of showing entitlement to a tax exemption is on the party claiming the exemption.[16]

Is Department Equitably Estopped From Claiming That Membership Dues Are Taxable?

Berrington argues that the district court erred in rejecting its claim that the department is estopped from taxing the dues paid by members of Eldorado Hills based upon the department's prior determination that membership dues paid to another golf club were not taxable. Berrington contends that the two organizations have essentially the same legal structure. The Tax Commissioner and the district court determined that there were significant differences in the structure of the two organizations.

[5,6] We need not compare and contrast the two organizational structures. Even if we assume arguendo that they are the same or similar and the department made inconsistent determinations of taxability, the elements of equitable estoppel are not established on this record. Equitable estoppel is a bar which precludes a party from denying or asserting anything to the contrary of those matters established as the truth by his own deeds, acts, or representations.[17] The State and its political subdivisions can be equitably estopped, but the doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.[18]

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[15] 316 Neb. Admin. Code, ch. 1, § 044.02.

[16] See, *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, *supra* note 8; *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

[17] *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

[18] See, *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003).

[7] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.[19] As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.[20]

There is nothing in the record to suggest that any action of the department during the prior audit was a false representation or concealment of material facts, nor was any action "calculated to convey" an impression that the regulations would be applied in a similar manner at Eldorado Hills. Nor does the record reflect the inability of Berrington to ascertain the truth or falsity of any pertinent facts. The record thus supports the determination of the district court that Berrington failed to carry the burden of proof on its equitable estoppel claim.

Is Berrington Entitled to Refund of Sales Tax Paid on Snack Foods?

Berrington claimed it was entitled to a refund of $3,228.04 due to taxes it erroneously paid on the sale of snacks that were not intended for immediate consumption. The applicable Department of Revenue regulations provided:

> 087.01A(4) Snack Foods. Snack foods are exempt unless the snack foods are sold by an eating establishment, concessionaire, or vending machine or are a part

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[19] *J.R. Simplot Co. v. Jelinek*, 275 Neb. 548, 748 N.W.2d 17 (2008); *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

[20] *Id.*

> of a meal. Examples of snack foods are potato chips, soft drinks, candy, chewing gum, cookies, and donuts.
>
> . . . .
>
> 087.02A(1) Any food sold through a vending machine is taxed.
>
> . . . .
>
> 087.02A(3) Any food sold by a concessionaire is taxed, except for certain sales by schools and school groups . . . .[21]

In support of its refund claim, Berrington's accountant prepared an "Estimated Sales Tax Overpayment Analysis For Years Ended December 31, 2002, 2003 & 2004." The estimate was based on six invoices which did not identify what products were sold, whether they were sold for immediate consumption, where they were sold, or even whether they were sold by Berrington at all. The district court found that Berrington did not carry its burden of proving that the snack foods were not sold through its restaurant as part of a meal, by its snack shop, or through a vending machine. We agree that these facts essential to the refund claim were not established by the evidence.

CONCLUSION

For the reasons discussed, we conclude that the decision of the district court affirming the determination of the Tax Commissioner in all respects conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

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[21] 316 Neb. Admin. Code, ch. 1, §§ 087.01A and 087.02A (1998).

IN RE INTEREST OF SPENCER O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SPENCER O., APPELLANT.

765 N.W.2d 443

Filed May 15, 2009. Nos. S-08-583, S-08-584.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. ____: ____. Determining whether a permanency hearing is required under Neb. Rev. Stat. § 43-1312(3) (Reissue 2004) presents a question of law, and an appellate court independently decides questions of law.
3. **Juvenile Courts.** Neb. Rev. Stat. § 43-1312(3) (Reissue 2004) requires a permanency hearing for every child in foster care.
4. **Parent and Child: Due Process.** The parent-child relationship is afforded due process protection.
5. **Due Process: Words and Phrases.** While the concept of due process defies precise definition, it embodies and requires fundamental fairness.
6. **Due Process: Parties: Notice.** Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.

Appeals from the Separate Juvenile Court of Lancaster County: LINDA S. PORTER, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Jennifer M. Houlden, and Sara Newell for appellant.

Karen Knight and Sarah E. Preisinger, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

Under Neb. Rev. Stat. § 43-1312(3) (Reissue 2004), every child in state-supervised foster care must have a permanency hearing no later than 12 months after the child enters foster care. At a permanency hearing, the court reviews and adopts a permanency plan for the child. A permanency plan focuses on providing the child with a safe, stable, and nurturing

environment and is the guiding philosophy when courts remove children from their home.[1]

Because of his misdemeanor violations, Spencer O., a child under 18 years of age, was subject to the juvenile court's jurisdiction under Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2006). Because Spencer's delinquent behavior resulted in his being placed in foster care, the Department of Health and Human Services (DHHS) requested a permanency hearing under § 43-1312(3). Spencer objected to the hearing. He claimed that § 43-1312(3) does not apply to juveniles who are in foster care because of their delinquent behavior instead of parental abuse or neglect. The juvenile court disagreed with Spencer and ordered a permanency hearing. The court approved DHHS' suggested permanency plan of reunification of Spencer with his mother.

Spencer argues that the court erred in holding a permanency hearing under § 43-1312(3) and adopting the permanency plan. We conclude that § 43-1312(3) applies to Spencer and, therefore, affirm the decision of the juvenile court.

BACKGROUND

In two separate cases, the State charged Spencer with two counts of criminal mischief and four counts of third degree assault. Because he was a minor and had committed misdemeanor offenses, he was subject to the juvenile court's jurisdiction under § 43-247(1). In May 2006, Spencer pleaded no contest to one count of criminal mischief and one count of third degree assault. In July 2006, he pleaded no contest to one count of criminal mischief and one count of third degree assault. In November 2007, he entered an admission to one count of third degree assault. The State dismissed the remaining count of third degree assault.

As part of the proceedings, the court held two hearings regarding Spencer's disposition and placement. The first hearing occurred in August 2006, and the court committed Spencer to the custody of the Office of Juvenile Services (OJS) for in-home placement. Because of additional delinquent behavior,

[1] Neb. Rev. Stat. § 43-533(4) (Reissue 2008).

however, OJS eventually removed Spencer from his home and placed him in a juvenile detention center. In November 2007, while still in custody of OJS, the juvenile court placed Spencer at a residential treatment center.

Later, in March 2008, DHHS requested, under § 43-1312(3), a permanency hearing. DHHS argued that because of Spencer's out-of-home placement, the court had placed him in foster care.[2] And because § 43-1312(3) requires a permanency hearing for "[e]ach child in foster care," the statute required the court to conduct a permanency hearing.

Spencer objected to the permanency hearing. He conceded that he was in foster care. But because the court's jurisdiction arose under § 43-247(1) (delinquent child), he argued that § 43-1312(3) did not apply. He argued that the court should have interpreted subsection (3) with subsections (1) and (2) of § 43-1312 and limited permanency hearings to those children subject to the court's jurisdiction under § 43-247(3), (4), or (9). DHHS argued that § 43-1312 (3) should be read independently from subsections (1) and (2).

The court held that § 43-1312(3) required every child in foster care to have a permanency hearing, even those subject to the court's jurisdiction under § 43-247(1). The court conducted a permanency hearing in April 2008. At the hearing, the court approved a permanency plan that reunited Spencer with his mother.

ASSIGNMENTS OF ERROR

Spencer asserts that the juvenile court erred in holding a permanency hearing under § 43-1312(3) and that by having the hearing, the court violated his due process rights.

STANDARD OF REVIEW

[1,2] We review juvenile cases de novo on the record, and we reach a conclusion independent of the juvenile court's findings.[3] Determining whether a permanency hearing is required

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[2] Neb. Rev. Stat. § 43-1301(3) and (4) (Reissue 2008).

[3] *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008).

under § 43-1312(3) presents a question of law. We independently decide questions of law.[4]

ANALYSIS

Section 43-1312 outlines the procedure and requirements for permanency hearings:

> (1) Following the investigation conducted pursuant to section 43-1311 and immediately following the initial placement of the child, the person or court in charge of the child shall cause to be established a safe and appropriate plan for the child. . . .
>
> . . . .
>
> (2) If the return of the child to his or her parents is not likely based upon facts developed as a result of the investigation, the Department of Health and Human Services shall recommend termination of parental rights and referral for adoption, guardianship, placement with a relative, or, as a last resort, another planned permanent living arrangement.
>
> (3) Each child in foster care under the supervision of the state shall have a permanency hearing by a court, no later than twelve months after the date the child enters foster care and annually thereafter during the continuation of foster care. The court's order shall include a finding regarding the appropriateness of the permanency plan determined for the child . . . .

Spencer contends that the juvenile court erred in finding that the permanency hearing requirement in § 43-1312(3) applies to every child in foster care despite the statutory procedure used by the juvenile court in acquiring jurisdiction over the child. He argues that § 43-1312(3) does not require a permanency hearing for children who are in foster care because of their adjudication under § 43-247(1). The State contends that the plain language of § 43-1312(3) mandates a hearing for every child in foster care. We have not previously decided whether the statute mandates a permanency hearing for every child in

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[4] *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

foster care or whether the statute limits permanency hearings to children identified in § 43-1312(1).

The juvenile code does not define "foster care." However, § 43-1301(4) defines "[f]oster care placements" to include "all placements of . . . delinquent children." Obviously, this definition is broad enough to include children placed outside their home because of delinquency. Also, Neb. Rev. Stat. § 43-1301.01 (Reissue 2008) provides that "a child is deemed to have entered foster care . . . sixty days after the date on which the child is removed from the home." This section also supports our conclusion that foster care includes removal from the home because of delinquency.

Section 43-1312(3) mandates that "[e]ach child in foster care . . . shall have a permanency hearing . . . ." The language of § 43-1312(3) does not limit the permanency hearing requirement to children in foster care for reasons other than delinquent acts. While § 43-1312(1) may refer to children in foster care because of an investigation conducted under Neb. Rev. Stat. § 43-1311 (Reissue 2004), § 43-1312(3) contains no such limitation. Subsection (3) simply states that a permanency hearing is required for every child in foster care placement.

Absent anything to the contrary, we will give statutory language its plain and ordinary meaning.[5] We recognize that the court placed Spencer in foster care because of his delinquent behavior. But nothing in § 43-1312(3) exempts children in foster care because of their delinquency from the permanency hearing requirement.

Additionally, requiring a permanency hearing in delinquency cases appears consistent with the purpose of such hearing. A permanency hearing allows the court to review the appropriateness of a plan for a child in foster care.[6] Furthermore, § 43-533(4) provides that when a court removes a child from his or her home, "permanency planning shall be the guiding philosophy." Read together, the statutes suggest that no matter why a court removes a child from his or her home—whether it is for delinquency or parental abuse or neglect—the Legislature

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[5] *In re Estate of Cooper*, 275 Neb. 297, 746 N.W.2d 653 (2008).

[6] *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999).

intended a review of the long-term plans for any child in foster care. Thus, we conclude that the juvenile court did not err in holding a permanency hearing.

[3] Because § 43-1312(3) requires a permanency hearing for every child in foster care, including delinquent children in foster care, we now address Spencer's argument that the permanency hearing violated his due process rights.

Spencer does not contest the substance of the permanency plan. Nor does he argue that the court did not properly notify him of the permanency hearing proceedings. Instead, he argues he received insufficient notice of the potential consequences of the permanency hearing. Specifically, he claims that the court did not inform him of all the options contemplated in § 43-1312(3), such as the termination of parental rights, adoption, and guardianship. He claims that because the court never informed him that it could terminate his mother's parental rights, he did not knowingly or intelligently enter his no contest pleas. We interpret his argument to mean that because the court did not inform him of the possibility of parental rights termination, the court's adjudication violated his due process protections.

[4-6] The law affords due process protection to the parent-child relationship.[7] While the concept of due process defies precise definition, it embodies and requires fundamental fairness.[8] Generally, procedural due process requires timely notice, reasonably calculated to inform the person concerning the subject and issues involved in the proceeding.[9]

At each hearing, the court informed Spencer that while in the custody of OJS, the court could place him in his mother's home, with services provided to him there, or could place him in a youth rehabilitation treatment center or other out-of-home setting such as a group home or treatment center. It is true that the court never informed him that it could terminate his mother's parental rights.

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[7] *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[8] *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[9] *Id.*

But, assuming without deciding that a juvenile adjudicated in a delinquency hearing is entitled to notice that the court could terminate parental rights, such termination was not a possibility when Spencer entered his plea. The court placed Spencer in the custody and care of OJS, an office charged with providing delinquent juveniles treatment in a manner consistent with public safety.[10] OJS did not have the authority to terminate Spencer's mother's parental rights.[11] To terminate parental rights, the State would first have to file a new petition under § 43-247(3) or Neb. Rev. Stat. § 43-291 (Reissue 2008). Either proceeding would be a separate case and not part of the delinquency proceedings. Thus, although § 43-1312(3) lists as an option the termination of parental rights, that was not a possibility in the State's delinquency case against Spencer.

Because termination of parental rights was not a possibility in Spencer's delinquency proceedings, we conclude that he received adequate notification of all possible consequences of his no contest plea.

AFFIRMED.

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[10] Neb. Rev. Stat. § 43-402 (Reissue 2008).

[11] See, generally, Neb. Rev. Stat. §§ 43-401 to 43-423 (Reissue 2008).

THE METROPOLITAN COMMUNITY COLLEGE AREA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA AND BODY CORPORATE AND POLITIC, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

765 N.W.2d 440

Filed May 15, 2009. No. S-08-813.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. ____: ____. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
3. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded.

Robert T. Cannella and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and James R. Thibodeau for appellant.

Paul D. Kratz, Omaha City Attorney, and Bernard J. in den Bosch for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

The Metropolitan Community College Area (Metro) filed an action requesting that the City of Omaha (City) be permanently enjoined from condemning land owned by Metro. The district court denied Metro's request. Metro appeals.

FACTUAL BACKGROUND

The facts of this case are largely stipulated. The City sought to condemn a portion of Metro's Elkhorn Valley campus. Metro's campus is within the city limits of the City and is located on the northeast corner of the intersection of U.S. Highway 6, also known as West Dodge Road, and Nebraska Highway 31, also known as 204th Street. There is just one entrance/exit to Metro's campus, which is located off of 204th Street. Metro's entrance/exit drive, while not a city street, is lined up across 204th Street with Cumberland Drive, which is a city street.

The City sought to widen and improve Metro's entrance/exit and also to connect a new street, 203d Street, from Veterans Drive north of campus, generally southward to the entrance/exit drive leading into Metro's campus. After acquisition of the property, what is currently the roadway leading into Metro's campus would become a city street and would be maintained by the City.

Because Metro was not responsive to the City's offer to purchase this property, the City filed a "Petition to Condemn

Property" in Douglas County Court on March 14, 2008. On April 11, Metro filed an action seeking to enjoin the City from condemning the property. The parties agreed to the entry of a temporary injunction so that a trial on the permanent injunction could proceed more expeditiously.

Following a trial regarding the issuance of a permanent injunction, the district court dismissed Metro's request. The court reasoned that the land in question was currently being used as a street, and that such was not a specific public use. The court continued: "The result of this condemnation is that it will still be used as a street, except that it will be more capable of handling more traffic and provide more access to adjacent areas." Metro appeals.

ASSIGNMENT OF ERROR

Metro assigns, restated and consolidated, that the district court erred in concluding that the City had the authority to condemn Metro's property.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[1]

ANALYSIS

The City's general power of eminent domain is set forth in Neb. Rev. Stat. § 14-366 (Reissue 2007), which provides in part:

> The city may purchase or acquire by the exercise of the power of eminent domain private property or public property *which is not at the time devoted to a specific public use*, for the following purposes and uses: (1) For streets, alleys, avenues, parks, recreational areas, parkways, playgrounds, boulevards, sewers, public squares, market places, and for other needed public uses or purposes authorized by this act, and for adding to, enlarging, widening, or extending any of the foregoing; and (2) for constructing or enlarging waterworks, gas plants, or other

[1] *Loves v. World Ins. Co.*, 276 Neb. 936, 758 N.W.2d 640 (2008).

> municipal utility purposes or enterprises authorized by this act.

(Emphasis supplied.)

[2,3] The parties are in agreement that the property in question is public property. Thus, the sole issue presented by this appeal is the interpretation of the phrase "devoted to a specific public use" and whether Metro's use of the property in question qualifies as such. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[2] And it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.[3]

Metro contends that as the sole means of ingress and egress into its campus, its entrance/exit drive is devoted to a specific public use. The City, meanwhile, suggests that the land in question is not devoted to a specific public use, because Metro's mission is to provide educational services. The City argues that Metro's entrance/exit is not sufficiently related to that mission. The City also argues that because its use would not impair or destroy Metro's use of the drive and, in fact, the City would improve the drive, the City should be permitted to acquire the land by eminent domain.

We agree with Metro that its entrance/exit is devoted to a specific public purpose. Without such an entrance, it would not be possible for Metro to effectively administer its mission of providing educational services. This is particularly true where the drive in question is the sole means of ingress and egress into campus. We reject the City's suggestion that because the entrance/exit drive is not directly related to the providing of educational services, it fails to qualify as a "specific public use."

We also reject the City's contention that the exercise of eminent domain in this case is permissible because the City would "improve" the drive, and because the drive would continue to

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[2] *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).

[3] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

be used as an entrance/exit to Metro's campus, Metro's use would not be impaired or destroyed. The City cites authority for this proposition,[4] and indeed the exception suggested by the City appears to be the rule in many jurisdictions.[5]

However, this court is concerned only with the language of § 14-366, a statute which appears to be relatively unique. The language of that statute provides that the City may "acquire by the exercise of the power of eminent domain . . . public property which is not at the time devoted to a specific public use." This statute makes no allowance for eminent domain if the taking would not impair or destroy the existing use. Instead, the statute very clearly provides the City the authority to take public property only if that property is not "devoted to a specific public use." We decline to read into the statute the exception suggested by the City.

We conclude the district court erred in dismissing Metro's request for a permanent injunction. We therefore reverse the district court's decision and remand this cause with instructions to enter an injunction restraining the City from proceeding with its planned condemnation of a portion of Metro's entrance/exit drive.

CONCLUSION

The decision of the district court is reversed, and the cause is remanded to the district court with instructions.

REVERSED AND REMANDED.

STEPHAN, J., not participating.

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[4] See *State ex rel. Md. Heights, Etc. v. Campbell*, 736 S.W.2d 383 (Mo. 1987).

[5] See 1A Julius L. Sackman, Nichols on Eminent Domain § 2.17 (3d ed. 2007).

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. David S. Wintroub, respondent.

765 N.W.2d 482

Filed May 22, 2009. Nos. S-05-1518, S-07-942.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee. When credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof.** In order to sustain a charge in a lawyer discipline proceeding, the Nebraska Supreme Court must find the charge to be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Convictions.** Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude, whether or not by plea agreement, is conclusive upon the lawyer in a disciplinary proceeding and is sufficient to authorize the court to impose discipline.
4. **Disciplinary Proceedings.** Offenses committed by an attorney in his capacity as a private individual and not in any professional capacity will nevertheless justify disciplinary proceedings if the misconduct is indicative of moral unfitness for the profession.
5. **Contracts: Attorney Fees.** A lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable.
6. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
7. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.
8. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.
9. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original actions. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for respondent in No. S-05-1518.

Melvin C. Hansen and Brian C. Hansen, of Nolan, Olson, Hansen, Lautenbaugh & Buckley, L.L.P., for respondent in No. S-07-942.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

I. INTRODUCTION

These two attorney disciplinary actions involve separate formal charges filed by the Counsel for Discipline of the Nebraska Supreme Court against David S. Wintroub, who was admitted to the practice of law in the State of Nebraska on September 28, 1995. Case No. S-05-1518 stems from Wintroub's involvement in illegally structuring transactions to avoid federal bank reporting laws. After a felony conviction for this conduct, Wintroub was temporarily suspended from the practice of law in the State of Nebraska. The suspension became effective on January 19, 2006. Case No. S-07-942 involves eight additional formal charges that were filed against Wintroub on September 6, 2007. These charges relate to his representation of various clients both before and after his suspension. In both cases, the court-appointed referee found that Wintroub had violated disciplinary rules, and Wintroub takes exception to the referee's findings and recommended sanctions. We impose discipline as indicated below.

II. FACTS

1. CASE NO. S-05-1518

In 2000, Wintroub agreed to sell to Gary Storey, Wintroub's neighbor, a 50-percent interest in an Internet business Wintroub was developing. The agreement called for Storey to invest $40,000 upon the execution of the written contract, $50,000 for operating expenses by August 25, 2000, and $30,000 for operating expenses by September 22, if deemed necessary.

Storey told Wintroub that he owned used car dealerships and that many of his customers paid him in cash and asked

if he could make some payments in cash. Wintroub agreed. Apparently, Storey made all his payments to Wintroub in cash, and he made them all in increments of less than $10,000. Wintroub received approximately $67,000 from Storey through seven cash deposits. At one point, in a period of just 7 days, Wintroub made four deposits of $9,000 each. When making these deposits, Storey would meet Wintroub at the bank, and Wintroub would deposit the cash into his business account and create a receipt for purposes of filing his corporate tax returns.

On October 4, 2005, pursuant to a plea agreement, Wintroub was convicted in the U.S. District Court for the District of Nebraska of structuring transactions to evade reporting requirements, in violation of 31 U.S.C. § 5324 (2000). Section 5324(a)(3) provides that no person shall structure or assist in structuring any transaction for the purpose of evading the reporting requirements of 31 U.S.C. § 5313 (2000). Section 5313(a), in conjunction with 31 C.F.R. § 103.22 (2005), requires banks to file currency transaction reports for any cash transaction exceeding $10,000.

Before accepting the plea, the U.S. District Court reviewed the factual basis for the charges. The parties agreed that 31 U.S.C. § 5324 did not require knowledge that structuring transactions was an illegal activity. However, they understood that it was necessary to show that Wintroub knew the law required banking institutions to report transactions over $10,000 and that he knowingly assisted in structuring the transactions with the purpose of avoiding the 31 U.S.C. § 5313 reporting requirement.

Wintroub admitted he knew at the time of the deposits that banks were required to report all cash transactions in excess of $10,000. He further admitted that it occurred to him that "Storey's decision to give me only cash amounts of less than $10,000 for deposit, may have been because he did not want the transaction to be subject to any report." As Wintroub's counsel stated to the court, "[I]t doesn't stretch the imagination for someone who knows that there is a $10,000 reporting requirement, that if you continually deposit $9,000 at a time, that there's some correlation between the amount

given and the reporting requirement." Nevertheless, counsel explained that Wintroub "didn't think it mattered to him whether . . . Storey was trying to avoid reporting requirements." Wintroub stated:

> I had no reason to be concerned about the transaction, and from my point of view, I did not know or understand that there was any prohibition on "structuring" financial transactions to avoid the reporting requirements, or that my making of those deposits was prohibited in any manner, as I was not the one who structured the manner in which the payments were made to me.

The court accepted Wintroub's plea, concluding that at the very least, Wintroub knowingly assisted in structuring a single transaction of $27,000 when he deposited that amount over the course of 3 consecutive days in cash deposits of $9,000 each. Wintroub was sentenced to 5 years' probation with 5 months of home confinement. Wintroub did not appeal his federal conviction.

After the conviction, Counsel for Discipline filed formal charges alleging that Wintroub had violated his oath of office as an attorney and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule); DR 1-102(A)(3) (engaging in illegal conduct involving moral turpitude); and DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation). A referee was appointed, and a hearing was held. At the disciplinary hearing, Wintroub generally accepted the factual basis for his felony conviction. He reiterated, however, that he had believed he had no duty to report his suspicion that Storey was structuring the payments so as to avoid reporting.

Wintroub testified that he did not formally investigate the legality of his actions, but instead simply "thought it through myself." Wintroub expressed his deep remorse and his regret for not having investigated the legality of his actions more thoroughly.

The referee found that Wintroub had violated DR 1-102(A)(1), (3), and (4). The referee noted that Wintroub had expressed genuine remorse and did not know he was directly violating

any law. Nevertheless, the referee found that Wintroub had committed a serious crime and had failed to conduct even the simplest investigation into the legality of his conduct, because he wished to receive the benefit of the payments. The referee recommended that Wintroub be suspended from the practice of law for 2 years.

2. Case No. S-07-942

Counsel for Discipline subsequently filed additional formal charges against Wintroub. These formal charges are before us as case No. S-07-942 and relate to Wintroub's representation of clients both before and after his suspension. For the sake of clarity, we describe the charges upon which the referee found disciplinary violations as they relate to individual clients.

(a) Andrea Franey

In February 2005, Andrea Franey retained Wintroub to represent her in a divorce action in Douglas County, Nebraska. Wintroub tried the case in September 2005, and on October 13, the judge issued a letter decision and directed Wintroub to prepare the decree. Wintroub never submitted a decree to the judge, and in February 2006, Franey hired new counsel to finally prepare the decree.

The formal charges alleged that Wintroub's conduct violated his oath of office as an attorney. The charges also alleged that his conduct violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 and 3-501.4. Section 3-501.3 requires a lawyer to act with diligence, and § 3-501.4 requires a lawyer to promptly communicate with a client.

In the referee's final report, he noted Wintroub's testimony that after receiving the letter decision from the judge, Wintroub prepared a decree and sent it to opposing counsel for approval. The referee noted, however, that Wintroub failed to offer into evidence a copy of any decree that he had prepared for Franey. The referee found that Franey's new attorney was able to contact opposing counsel, who approved the decree that the new attorney prepared. The referee concluded that Wintroub's failure "to follow through in getting the Decree entered" violated §§ 3-501.3 and 3-501.4.

(b) Scott Thompson

On June 20, 2005, Scott Thompson retained Wintroub to represent him in a driving under the influence action. Approximately 2 weeks later, Thompson terminated Wintroub's representation. A written fee agreement signed by Thompson provided that he would pay Wintroub a $1,500 "non-refundable flat fee," and Thompson had paid Wintroub that amount. After he terminated Wintroub's representation, Thompson requested a partial refund, and Wintroub stated he would look at the amount of time he spent on the matter. No amount of the fee was refunded to Thompson.

The formal charges alleged that Wintroub's acts violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. § 3-501.16(d), which provides that upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." Because Wintroub's acts occurred prior to September 1, 2005, however, the applicable disciplinary rule is actually Canon 2, DR 2-110(A)(3),[1] which provided that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned." The two rules are substantially similar.

The referee noted Wintroub testified that he met with Thompson twice, prepared for an administrative license revocation hearing, and prepared a motion. However, Wintroub's representation was terminated prior to the hearing, and Wintroub did not offer a copy of the motion he allegedly prepared as evidence. The referee found that Wintroub violated the disciplinary rule when he did not complete the representation of Thompson and did not refund any portion of the advance fee payment. In arriving at this conclusion, the referee found that Wintroub clearly received fees for work he did not do for Thompson.

(c) Robert Ginter

Robert Ginter retained Wintroub on February 24, 2004. A written fee agreement signed by Ginter provided for a

[1] See *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

"non-refundable fee in the amount of $4,000.00" and for an additional one-third contingency fee of any amounts recovered in a lawsuit. Wintroub filed a complaint on behalf of Ginter in the U.S. District Court on April 5, 2005. Ginter terminated Wintroub's representation on June 3 and requested a refund of the unearned portion of the fee. No refund has been made.

The formal charges alleged that Wintroub's conduct violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. § 3-501.1 (competence) and §§ 3-501.3 (diligence) and 3-501.16 (declining or terminating representation). We note that because Wintroub's conduct occurred prior to September 1, 2005, the charges should have been based on the Code of Professional Responsibility.[2] It appears that the referee may have recognized this, as he concluded that due to the conflicting evidence in the record, the only disciplinary violation proved by clear and convincing evidence was Wintroub's neglect of a legal matter for failing to timely file the complaint. The referee cited the correct provision, Canon 6, DR 6-101(A)(3), which prohibits a lawyer from "[n]eglect[ing] a legal matter entrusted to him or her."

(d) Shari Kearney

Wintroub represented Shari Kearney in a lawsuit against her employer. Kearney sent Wintroub a check for $1,500 on February 6, 2006. The referee found that this was after Wintroub was aware of his suspension from the practice of law in Nebraska, which was effective January 19, 2006. After Wintroub was suspended, his father, who is also an attorney, continued to represent Kearney, but ultimately, Wintroub's father advised her to find other counsel to continue her lawsuit. Kearney sought, but did not receive, a refund of a portion of the $1,500 she paid to Wintroub.

The formal charges alleged that Wintroub violated his oath of office as an attorney, §§ 3-501.3 (diligence), 3-501.4 (communications), and 3-501.16 (declining or terminating representation), and Neb. Ct. R. of Prof. Cond. § 3-508.4 (misconduct). The charges also alleged that Wintroub violated Neb. Ct. R. of

[2] See *id.*

Prof. Cond. §§ 3-505.5 by engaging in the unauthorized practice of law in another jurisdiction and 3-507.3 by soliciting a prospective client.

The referee was "particularly troubled" that Wintroub accepted fees from Kearney after "he clearly was aware he had been suspended from the practice of law." He found that no refund was paid to Kearney, even though Wintroub failed to complete her case, and noted that Wintroub's father testified that he thought Kearney should be given a refund. The referee found that it was clear that Wintroub received fees from Kearney for work he did not perform and concluded that Wintroub's conduct violated §§ 3-501.3 (diligence), 3-501.4 (communications), and 3-501.16 (declining or terminating representation).

(e) Trent Jindra

After his suspension, Wintroub operated Wintroub Consulting Services. On August 16, 2006, Wintroub was retained by Trent Jindra to assist in the collection of a past-due business debt. Wintroub sent a collection letter on behalf of Jindra. At the time, Wintroub was not licensed as a collection agent.

The formal charges alleged that Wintroub's conduct violated his oath of office as an attorney and § 3-508.4 (misconduct). The referee found that Wintroub acted as a collection agent for Jindra after he had been suspended. The referee found Wintroub's testimony about being unaware that he was required to be licensed in order to act as a collection agent "not credible." He found Wintroub's assertions that he had consulted a law professor and a lawyer about the need to be licensed and told there was no such requirement to be "very troublesome" and "totally unworthy of credibility." The referee concluded that Wintroub's conduct violated § 3-508.4.

(f) Other Charges and Findings

The formal charges also alleged that Wintroub violated disciplinary rules in his representation of another client and did not timely respond to the Counsel for Discipline. The referee found there was insufficient evidence to support these allegations. In his final decision, the referee referenced a prior

disciplinary action against Wintroub that had been dismissed and the pending action in case No. S-05-1518. The referee also specifically noted Wintroub's failure to provide documentary evidence to support his testimony. The referee ultimately recommended that Wintroub be suspended from the practice of law for a period of 3 years.

III. EXCEPTIONS

1. Case No. S-05-1518

In case No. S-05-1518, Counsel for Discipline asserts that the 2-year suspension recommended by the referee is too lenient. Wintroub, on the other hand, asserts that he did not violate the Code of Professional Responsibility, because the conduct underlying his felony conviction does not implicate his honesty, trustworthiness, or fitness to practice law. He also argues that a 2-year suspension is excessive.

2. Case No. S-07-942

Counsel for Discipline filed no exceptions in case No. S-07-942. Wintroub filed 11, and asserts, restated, that the referee erred in (1) finding he failed to get the divorce decree finalized for Franey, (2) finding he did not adequately represent Thompson and did not refund an unearned portion of an advance fee payment, (3) finding he failed to file a complaint for Ginter for over a year after he had been retained, (4) finding he violated disciplinary rules with regard to his representation of Kearney, (5) finding he accepted fees from Kearney after he was aware that he had been suspended from the practice of law, (6) finding he attempted to collect a debt for Jindra when not licensed to do so, (7) finding he failed to refund fees for work which he did not do to Thompson and Kearney, (8) finding his testimony about the need to have a license to collect debts not to be credible, (9) relying on previous disciplinary cases involving Wintroub that had been dismissed or that were pending, (10) considering that Wintroub presented no evidence to corroborate his testimony on the work he did for former clients, and (11) recommending a sanction that was unduly severe given the facts and circumstances of the case.

IV. STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee.[3] When credible evidence is in conflict on material issues of fact, however, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.[4]

V. ANALYSIS

1. Violations

[2] In our de novo review, we first consider what violations occurred. In order to sustain a charge in a lawyer discipline proceeding, we must find the charge to be established by clear and convincing evidence.[5] We limit our review to the disciplinary violations found by the referee and to which Wintroub has taken exception.

Because the conduct in case No. S-05-1518 occurred prior to the September 1, 2005, effective date of the Nebraska Rules of Professional Conduct, the charges in that case are governed by the now-superseded Code of Professional Responsibility.[6] The conduct leading to the charges in case No. S-07-942 occurred both before and after September 1, 2005. Thus, although Counsel for Discipline charged Wintroub under the Nebraska Rules of Professional Conduct, we will apply the superseded Code of Professional Responsibility to those acts occurring prior to the effective date of the Rules of Professional Conduct.[7]

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[3] *State ex rel. Counsel for Dis. v. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

[4] See *State ex rel. Counsel for Dis. v. Scott*, 275 Neb. 194, 745 N.W.2d 585 (2008).

[5] See *State ex rel. Counsel for Dis. v. Herzog*, *ante* p. 436, 762 N.W.2d 608 (2009).

[6] See *State ex rel. Counsel for Dis. v. Switzer*, *supra* note 1.

[7] *Id.*

(a) Case No. S-05-1518

The facts leading up to Wintroub's felony conviction and the subsequent disciplinary proceedings in case No. S-05-1518 are largely undisputed. Wintroub claims, however, that his actions did not violate any disciplinary rule. In particular, Wintroub emphasizes that he did not know it was illegal to assist in structuring transactions, and he argues that the actions that led to his conviction were not inherently immoral, characterizing his criminal acts as "'technical.'"[8] Wintroub points out that under DR 1-102(A)(3), not all illegal conduct is subject to discipline, but only illegal conduct "involving moral turpitude." Wintroub asserts his conduct did not involve moral turpitude and did not involve "dishonesty, fraud, deceit, or misrepresentation," as was required under DR 1-102(A)(4). We disagree.

While the original enactment of 31 U.S.C. § 5324 required that the defendant act with knowledge that structuring was unlawful,[9] most courts hold that § 5324, as amended,[10] now requires only that the following elements be met in order to sustain a conviction: (1) the defendant in fact engaged in acts of structuring, (2) he or she did so with knowledge that the financial institutions involved were legally obligated to report currency transactions in excess of $10,000, and (3) he or she acted with intent to evade that reporting requirement.[11] The record in this case demonstrates that the U.S. District Court convicted Wintroub with this understanding of the elements of the offense.

Contrary to Wintroub's characterization, § 5324 is not a strict liability or merely a "technical" crime. Section 5324

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[8] Brief for respondent in case No. S-05-1518 at 16.

[9] See *Ratzlaf v. United States*, 510 U.S. 135, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994).

[10] Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, § 411(a) and (c)(1), 108 Stat. 2160, 2253 (codified at 31 U.S.C. §§ 5322(a) and (b) and 5324 (2000)).

[11] See, *U.S. v. MacPherson*, 424 F.3d 183 (2d Cir. 2005); *U.S. v. Pang*, 362 F.3d 1187 (9th Cir. 2004); *U.S. v. Gabel*, 85 F.3d 1217 (7th Cir. 1996). But see *U.S. v. Noske*, 117 F.3d 1053 (8th Cir. 1997).

requires the mens rea of knowing of the bank reporting requirements and knowingly circumventing those requirements. Thus, Wintroub's conviction establishes that he knowingly hid his cash transaction with Storey from the government, knowing the government wished to be informed of the transaction.

It is true that "currency structuring is not inevitably nefarious,"[12] but we conclude that knowingly assisting in a scheme to evade government-mandated reporting requirements, without even inquiring into the reasons for such subterfuge, is contrary to concepts of honesty and good morals, and thus involves moral turpitude.[13]

[3] We reject any argument by Wintroub that simply because he was unaware that his actions were subject to criminal penalties, those actions cannot constitute a crime of moral turpitude. Since 1986, it has been a crime to structure a financial transaction to evade the reporting law.[14] We have repeatedly recognized the maxim that ignorance of the law is not an excuse.[15] This maxim applies with even greater emphasis to an attorney who is expected to be learned in the law.[16] Generally, a judgment of conviction of a felony or misdemeanor involving moral turpitude, whether or not by plea agreement, is conclusive upon the lawyer in a disciplinary proceeding and is sufficient to authorize the court to impose discipline.[17] We find there is clear and convincing evidence that Wintroub violated DR 1-102(A)(3).

We also find there is clear and convincing evidence that Wintroub violated DR 1-102(A)(4), which prohibits a lawyer

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[12] *Ratzlaf v. United States*, *supra* note 9, 510 U.S. at 144.

[13] *State ex rel. NSBA v. Mahlin*, 252 Neb. 985, 568 N.W.2d 214 (1997); *State ex rel. NSBA v. Caskey*, 251 Neb. 882, 560 N.W.2d 414 (1997).

[14] 31 U.S.C. § 5324 (Supp. V 1987).

[15] See *State ex rel. Nebraska State Bar Assn. v. Hollstein*, 202 Neb. 40, 274 N.W.2d 508 (1979).

[16] *Id.*

[17] See, *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997); *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982).

from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Assisting in the deliberate concealment of a transaction over $10,000 is deceitful. Because Wintroub violated DR 1-102(A)(3) and (4), we likewise find that Wintroub violated DR 1-102(A)(1) (violating disciplinary rule).

[4] Although Wintroub points out that he was not acting as a lawyer when he committed the acts leading to the violations, we have said that offenses committed by an attorney in his capacity as a private individual and not in any professional capacity will nevertheless justify disciplinary proceedings if the misconduct is indicative of moral unfitness for the profession.[18] We conclude that Wintroub's actions leading to his felony conviction, which stemmed from deliberately turning a blind eye to the law, are indicative of moral unfitness for the profession. Thus, Wintroub is properly subject to discipline. Before determining what that discipline should be, we address the additional violations found by the referee in case No. S-07-942.

(b) Case No. S-07-942

(i) Franey

The referee found clear and convincing evidence that Wintroub failed to act diligently in representing Franey and failed to communicate with her. Wintroub argues that the referee's findings are not supported by clear and convincing evidence.

We agree that there is no clear and convincing evidence that Wintroub failed to communicate with Franey, as the record contains very little evidence about his communications with her. We find, however, that there is clear and convincing evidence that Wintroub failed to act with due diligence in procuring the final divorce decree. Wintroub contends the evidence is undisputed, based on his testimony, that he did submit a decree to opposing counsel after receiving the letter decision from

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[18] See, *State ex rel. Counsel for Dis. v. Hughes*, 268 Neb. 668, 686 N.W.2d 588 (2004); *State ex rel. NSBA v. Brown*, *supra* note 17; *State ex rel. NSBA v. Leonard*, *supra* note 17; *State ex rel. NSBA v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957).

the judge but did not receive a response. However, it is clear from the referee's findings that he found Wintroub's testimony on this issue lacked credibility. It is equally clear that no final decree was procured until Franey hired separate counsel. Based on the record before us, we conclude that Wintroub failed to act with due diligence because he failed to procure the final divorce decree for Franey, thus violating § 3-501.3 of the Nebraska Rules of Professional Conduct.

(ii) Thompson

The referee made a specific finding that Wintroub received fees for work he did not do for Thompson and that this receipt of unearned fees and failure to complete Thompson's representation violated § 3-501.16(d). Again, we note that the applicable disciplinary provision is actually DR 2-110(A)(3), which is substantially similar to § 3-501.16(d).

The evidence in the record is that Thompson terminated Wintroub's representation before Wintroub could complete the representation, and thus, the referee's finding that Wintroub committed a disciplinary violation by failing to complete Thompson's representation is not supported by clear and convincing evidence. The record does, however, support the referee's finding that Wintroub received fees for work he did not perform for Thompson. Although Wintroub testified that he performed extensive services for Thompson, the referee implicitly found this testimony to lack credibility. Wintroub was employed by Thompson for only approximately 2 weeks, and there is no documentary evidence of any services performed for Thompson. We defer to the referee's judgment of Wintroub's credibility and conclude that there is clear and convincing evidence that Wintroub did not earn the entire $1,500 fee he received from Thompson.

[5] Wintroub contends that the fee agreement Thompson signed clearly provided for a nonrefundable fee and that because such an agreement does not violate any disciplinary rules, he is not subject to discipline, even if he did not earn the entire fee he received from Thompson. We disagree. Pursuant to DR 2-110(A)(3), a lawyer must "refund promptly any part of a fee paid in advance that has not been earned."

When interpreting similar ethical and disciplinary rules, other courts have concluded that a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable.[19] In doing so, some courts have concluded that nonrefundable fee agreements are invalid per se.[20] Most courts find that nonrefundable fee agreements are not invalid per se, but nevertheless refuse to enforce the "nonrefundable" aspect of the agreement on a case-by-case basis if the amount of the agreed-upon fee is not actually earned by the attorney.[21]

In the instant case, we need not resolve whether a nonrefundable fee agreement is unenforceable per se, because the fee agreement before us is unenforceable under either rule. We note that this is not a case involving a "general" retainer paid in order to secure a lawyer's availability,[22] and we offer no opinion on the enforceability of a nonrefundable fee agreement in that context. We conclude there was clear and convincing evidence that Wintroub violated DR 2-110(A)(3) when he retained fees paid by Thompson that he did not earn.

(iii) Ginter

The referee found that Wintroub committed neglect by failing to file the Ginter complaint in a timely manner. Wintroub contends that this violation was not supported by clear and convincing evidence. He contends that the Ginter complaint involved a wrongful termination lawsuit in federal court

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[19] See, *In re Miles*, 335 S.C. 242, 516 S.E.2d 661 (1999); *Matter of Hirschfeld*, 192 Ariz. 40, 960 P.2d 640 (1998); *Iowa Supreme Court Bd. of Ethics v. Apland*, 577 N.W.2d 50 (Iowa 1998); *Columbus Bar Assn. v. Klos*, 81 Ohio St. 3d 486, 692 N.E.2d 565 (1998); *Matter of Thonert*, 682 N.E.2d 522 (Ind. 1997); *Matter of Cooperman*, 83 N.Y.2d 465, 633 N.E.2d 1069, 611 N.Y.S.2d 465 (1994); *In re Gastineau*, 317 Or. 545, 857 P.2d 136 (1993); *Cluck v. Commission for Lawyer Discipline*, 214 S.W.3d 736 (Tex. App. 2007); *Wright v. Arnold*, 877 P.2d 616 (Okla. App. 1994).

[20] See, *Iowa Supreme Court Bd. of Ethics v. Apland*, *supra* note 19; *Matter of Cooperman*, *supra* note 19; *In re Gastineau*, *supra* note 19; *Wright v. Arnold*, *supra* note 19.

[21] See, *In re Miles*, *supra* note 19; *Matter of Hirschfeld*, *supra* note 19; *Columbus Bar Assn. v. Klos*, *supra* note 19; *Matter of Thonert*, *supra* note 19; *Cluck v. Commission for Lawyer Discipline*, *supra* note 19.

[22] See 1 Robert L. Rossi, Attorneys' Fees § 1.2 at 7 (2d ed. 1995).

"which all lawyers know is a substantial undertaking."[23] We conclude that there is not clear and convincing evidence to support this violation. There is conflicting evidence in the record as to what services Wintroub performed for Ginter, and we are unable to say from the record that a 1-year delay in filing what appears to be a complicated legal action constitutes neglect.

(iv) Kearney

The referee found that Wintroub's conduct with respect to his representation of Kearney violated §§ 3-501.3 (diligence), 3-501.4 (communications), and 3-501.16 (declining or terminating representation). The referee made a factual finding that Wintroub accepted fees from Kearney "after he clearly was aware he had been suspended from the practice of law." Implicit in this factual finding is the referee's rejection of Wintroub's contention that the $1,500 paid by Kearney was for work he performed for her prior to February 2006.

We conclude that there is no clear and convincing evidence that Wintroub either failed to communicate with Kearney or failed to diligently work on her case, as the record is almost entirely silent on these issues. We conclude, however, that there is clear and convincing evidence that Wintroub received fees from Kearney in February 2006, after he had been suspended, and retained fees that he did not earn. The record thus supports the finding that he violated § 3-501.16.

(v) Jindra

The referee concluded that Wintroub violated § 3-508.4 by acting as a collection agent without a license after his law license was suspended. Wintroub contends that he may have made a mistake in not being licensed as a debt collector and in relying on legal advice that he need not be licensed, but that there was no intentional wrongdoing, and that thus, the evidence is not clear and convincing to support this allegation. The referee found that Wintroub's testimony on this issue was not credible, and we conclude that clear and convincing

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[23] Brief for respondent in case No. S-07-942 at 10.

evidence supports the referee's finding that Wintroub violated § 3-508.4.

(vi) Other Findings

Wintroub argues that the referee improperly referenced both a prior disciplinary case against him that was ultimately dismissed and the pending action in case No. S-05-1518 when recommending the sanction to be imposed in case No. S-07-942. Although the referee noted these actions in his report, it is clear that they were not the sole basis for the recommended sanction. Further, imposition of the ultimate sanction on Wintroub is a function of this court in this proceeding, and thus, any error committed by the referee is inconsequential.

Wintroub also argues that the referee improperly shifted the burden of proof to him by requiring him to present documentary evidence in support of his testimony. We construe the referee's comments on the lack of documentary evidence in the record to relate solely to his finding that Wintroub's testimony lacked credibility and do not view this as an improper shifting of the burden of proof. These exceptions are without merit.

2. SANCTIONS

[6-8] We turn now to the appropriate discipline for the violations that have been established by clear and convincing evidence in these two cases. To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[24] The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.[25]

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[24] See, *State ex rel. Counsel for Dis. v. Wickenkamp*, *ante* p. 16, 759 N.W.2d 492 (2009); *State ex rel. Counsel for Dis. v. Hubbard*, 276 Neb. 741, 757 N.W.2d 375 (2008).

[25] See *State ex rel. Counsel for Dis. v. Orr*, *ante* p. 102, 759 N.W.2d 702 (2009).

Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[26]

[9] Between these two cases, we have found clear and convincing evidence that Wintroub has violated at least seven different disciplinary rules. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[27] The records in these two cases reflect a pattern of misconduct involving not only neglect, but also deceit for personal gain.

Wintroub's felony conviction for assisting in hiding a large cash transaction from the federal government is far from merely "technical." It was dishonest. Moreover, as an attorney, Wintroub has an obligation to uphold the laws of the United States.[28] Wintroub never made any inquiry into the legality of his actions, despite the fact that he was aware he was circumventing federal reporting procedures. Neither did Wintroub investigate whether he might be assisting in the laundering of illegal drug money, despite his admission that he found it suspicious that Storey gave him cash only in amounts less than $10,000. His failure to question his actions resulted in a grievous breach of professional ethics. His conviction violates basic notions of honesty and endangers public confidence in the legal profession.

Wintroub's failure to investigate the legality of his actions as a debt collector illustrates his continued indifference to the rule of law. The record also reveals a consistent pattern of ethical violations related to Wintroub's representation of clients. Wintroub failed to complete Franey's representation, and we, like the referee, are particularly troubled that he retained fees he did not earn from Thompson and Kearney, and even accepted fees from Kearney after he was aware he had been suspended from the practice of law in this state.

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[26] *Id.*

[27] *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008); *State ex rel. Counsel for Dis. v. Beach*, 272 Neb. 337, 722 N.W.2d 30 (2006).

[28] See *State ex rel. Counsel for Dis. v. Boose*, *ante* p. 1, 759 N.W.2d 110 (2009).

Wintroub testified that he sincerely regretted not inquiring into the legality of structuring cash transactions, but his consistent and cumulative violations of our disciplinary rules reflects a general failure to fully comprehend the nature of his conduct. Considering the need to protect the public, the need to deter others, the reputation of the bar as a whole, Wintroub's fitness to practice law, and the aggravating and mitigating circumstances, we conclude that Wintroub should be disbarred from the practice of law.

VI. CONCLUSION

There is clear and convincing evidence in case No. S-05-1518 that Wintroub violated DR 1-102(A)(1), (3), and (4) of the Code of Professional Responsibility. Likewise, in case No. S-07-942, there is clear and convincing evidence that he violated DR 2-110(A)(3) and §§ 3-501.3, 3-501.16, and 3-508.4 of the Nebraska Rules of Professional Conduct. It is therefore the judgment of this court that Wintroub is disbarred from the practice of law in the State of Nebraska, effective immediately. Wintroub is directed to comply with Neb. Ct. R. § 3-316, and upon failure to do so, he shall be subject to punishment for contempt of this court. Wintroub is further directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., participating on briefs in No. S-07-942.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
PARRY HEDGCOCK, APPELLANT.
765 N.W.2d 469

Filed May 22, 2009. No. S-07-617.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part

standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.

2. **Constitutional Law: Search and Seizure.** For the protections of the Fourth Amendment to apply, a seizure must have occurred.
3. **Police Officers and Sheriffs: Search and Seizure.** A police officer may make a seizure by a show of authority and without the use of physical force.
4. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** There is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. Thus, a seizure requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.
5. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure: Appeal and Error.** To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment, an appellate court employs the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993), which describes the three levels, or tiers, of police-citizen encounters.
6. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning, and does not involve any restraint of the liberty of the citizen involved. In other words, one who voluntarily accompanies the police for questioning has not been seized. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.
7. **Police Officers and Sheriffs: Search and Seizure.** A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required.
8. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A police officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement. In other words, a seizure does not occur simply by reason of the fact that a police officer approaches an individual, asks him or her for identification, and poses a few questions to that individual.
9. ____: ____: ____. Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment.
10. **Police Officers and Sheriffs: Search and Seizure.** A tier-two police-citizen encounter constitutes an investigatory stop as defined by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. Because of its less intrusive nature, a tier-two encounter requires only that an officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that criminal activity is afoot.

11. **Police Officers and Sheriffs: Search and Seizure: Arrests.** A tier-three police-citizen encounter constitutes an arrest. An arrest involves a highly intrusive or lengthy search or detention.
12. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
13. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.
14. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.
15. ____: ____. Police deception which is not coercive in nature will not invalidate an individual's consent to search if the record otherwise shows the consent was voluntary.
16. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The use by law enforcement of a ruse checkpoint, without an unreasonable seizure for Fourth Amendment purposes, is not unconstitutional simply because it is a ruse.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Brent M. Bloom for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

Parry Hedgcock pulled his vehicle into the Platte River rest area immediately after seeing checkpoint signs. These signs were "ruse checkpoint" signs indicating that a drug checkpoint was set up farther down the road when, in reality, there was no checkpoint. At the rest area, Hedgcock was approached by an officer who was wearing plain street clothes and was not displaying his weapon. The officer informed Hedgcock that he was not in any trouble or under arrest. He then asked Hedgcock to answer a few questions, and Hedgcock agreed.

After a few minutes of talking with the officer, Hedgcock consented to a search of his vehicle, resulting in the officer's finding marijuana.

As a result of this encounter, Hedgcock was charged with possession of marijuana weighing more than 1 pound and with intent to distribute. The district court denied his motion to suppress certain statements and physical evidence obtained by officers, and Hedgcock was found guilty. He appeals his convictions, alleging that the use of the ruse checkpoint was unconstitutional.

BACKGROUND

On February 22, 2006, the Nebraska State Patrol strategically placed signs along Interstate 80, eastbound, indicating that there was a drug checkpoint farther down the road. The checkpoint signs were posted along the shoulder and the median of Interstate 80 near the Platte River rest area in Cass County. The checkpoint signs read "'Nebraska State Patrol Check Point Ahead'" and "'Drug Dog in Use.'" The signs alternated prior to the exit for the rest area, and a couple of signs were placed after the rest area. However, there was no drug enforcement checkpoint on Interstate 80. The checkpoint signs were placed near the Platte River rest area exit to induce motorists engaged in drug-related activity to take the exit in order to avoid the drug checkpoint.

Five officers, including Officers Alan Eberle, Richard Lutter, and Jason Scott, waited in the rest area either on foot or in unmarked vehicles, with their weapons concealed, wearing plain street clothes. The officers at the rest area observed individuals' behaviors for any indicators or circumstances that would alert them to possible drug activity. In his deposition, Scott testified that some of the indicators the officers looked for included the motorists' reactions to the signs, such as braking rapidly to enter the rest area, how fast the vehicle pulled into the rest area, where the vehicle parked in the rest area, and the passengers' behaviors once the vehicle is parked. If the officers observed any suspicious indicators or circumstances, then they would make contact.

Another officer waited in an unmarked car, in the middle of Interstate 80, observing motorists' reactions to the checkpoint signs. The officer specifically watched for motorists who made a "rapid departure" into the rest area, as such activity was indicative of someone attempting to avoid the checkpoint. The officer was to alert the other officers waiting at the rest area of any motorists' reactions that were suspicious.

At approximately 10:30 a.m., an officer informed Eberle that the driver of a white Chevrolet Blazer, with Utah plates, rapidly applied the brakes and changed lanes to enter the rest area after seeing the checkpoint signs. Eberle testified that after he received that information, he, along with Lutter and Scott, observed the Blazer enter the rest area. Even though there were empty stalls in front of the building, the Blazer parked away from the rest area building.

After the Blazer parked, the occupants, Hedgcock and Anthony Womack, sat inside the vehicle for approximately 2 minutes. Eventually, Womack (the passenger) and Hedgcock (the driver) got out of the vehicle. Womack walked to the restrooms, but Hedgcock stayed close to the Blazer.

This behavior made the officers at the rest area suspicious. Eberle testified that in his experience, when individuals are transporting narcotics, one person always stays close to the vehicle to make sure that it is never left unattended. Scott testified that he was suspicious because Hedgcock parked the Blazer away from the rest area building, Hedgcock and Womack stayed in the Blazer for awhile, and Hedgcock stayed with the vehicle while Womack went to the restroom. Lutter testified that he, too, was suspicious because Womack and Hedgcock stayed in the vehicle for so long after parking and then proceeded to stand near the vehicle for a time "as if they were still trying to determine what they were going to do." Lutter testified that this behavior was inconsistent with regular use of the rest area.

Eberle followed Womack to the restroom and waited outside for him to come out. After Womack came out of the restroom, Eberle approached him, and they talked for awhile. While Eberle was talking with Womack over by the restrooms,

Lutter walked over to the Blazer to talk with Hedgcock. Lutter approached Hedgcock and presented his badge, identifying himself as a law enforcement officer. He then advised Hedgcock that he was not under arrest and that he was not in any kind of trouble. According to Lutter, he asked Hedgcock, in a conversational, nondirective tone, to talk for a minute, and Hedgcock said, "Okay."

Lutter asked Hedgcock for identification, and Hedgcock gave him his Utah driver's license. Hedgcock informed Lutter that he was coming from Utah to Chicago to visit a friend, but Hedgcock could not provide any other details about the trip. Lutter then explained to Hedgcock that he was watching for people that may be transporting illegal items such as guns, drugs, and explosive devices. He then asked Hedgcock whether he had any such items with him or in his vehicle, to which Hedgcock stated he did not. During their conversation, Lutter observed that Hedgcock continued to look away from him as if he was searching for his companion and that Hedgcock appeared to be nervous.

Eventually, Lutter asked Hedgcock for consent to search the Blazer, and Hedgcock responded, "[g]o ahead," and stepped away from the Blazer. Lutter testified that as soon as he opened the passenger-side door to search the Blazer, he smelled burned marijuana. After examining the front compartment, Lutter asked Hedgcock and Womack whether there was marijuana in the vehicle, to which Hedgcock stated that "there might be some in the ash tray." The officers found a marijuana cigarette in the ashtray and continued their search of the vehicle.

Eberle testified that after the marijuana cigarette was found, neither Womack nor Hedgcock was free to leave, because the officers intended to issue a citation. However, the record reveals that neither officer indicated in any way that Womack and Hedgcock were not free to leave. Both officers testified that before the marijuana cigarette was found, Hedgcock and Womack were free to leave at any time.

As the search continued, Eberle asked Hedgcock whether he could search inside the luggage compartment on the top of the Blazer. Hedgcock indicated that a set of keys in the driver's door would open the luggage compartment; however, none of

the keys fit the lock. Eberle asked Hedgcock again about how to open the luggage compartment, and Hedgcock told him that he left the key at home. Hedgcock consented to a search of his person, and after searching, Eberle found a single key in Hedgcock's pocket that fit the luggage compartment lock. After finding the key, Eberle asked Hedgcock what was in the luggage compartment that he did not want the officers to find, and Hedgcock stated: "'I'm transporting marijuana.'"

Based on this confession, Eberle arrested Hedgcock. The officers opened the luggage compartment and found three black garbage bags full of marijuana, approximately 50 pounds. Eberle then read Hedgcock his *Miranda* rights, and Hedgcock agreed to talk.

Eberle asked Hedgcock some questions about where the marijuana was going, but Hedgcock would not give him any details. Hedgcock told Eberle that he was responsible for the marijuana and then requested an attorney. At that point, Eberle stopped questioning him. However, on the way to the police station, Hedgcock made a comment regarding his thoughts on legalizing marijuana.

The district court overruled Hedgcock's motion to suppress as to the physical evidence and the statements he made before asking for an attorney, but granted the motion as to the statements Hedgcock made on the way to the police station. The court concluded that the encounter between Hedgcock and the officers was a tier-one encounter, because Hedgcock voluntarily agreed to talk to the officers and because the evidence did not show circumstances indicative of a seizure. Thus, the encounter did not rise to the level of a seizure and was therefore outside the realm of Fourth Amendment protection. The court also noted that Hedgcock was not stopped at a checkpoint, because he stopped at the rest area on his own volition. The court stated: "The fact that [Hedgcock's] consent to talk to the officer(s) and his consent to the search worked to his detriment does not give rise to an illegal search or seizure." Hedgcock was convicted and sentenced. He now appeals.

ASSIGNMENTS OF ERROR

Hedgcock claims, restated, that the district court erred in overruling his motion to suppress, because (1) the Platte River

rest area was in fact an unconstitutional drug checkpoint and (2) the encounter between himself and the officers constituted an unconstitutional seizure.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[1] Regarding historical facts, we review the trial court's findings for clear error.[2] But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[3]

Likewise, we apply the same two-part analysis when reviewing whether a consent to search was voluntary. As to the historical facts or circumstances leading up to a consent to search, we review the trial court's findings for clear error. However, whether those facts or circumstances constituted a voluntary consent to search, satisfying the Fourth Amendment, is a question of law, which we review independently of the trial court.[4] And where the facts are largely undisputed, the ultimate question is an issue of law.[5]

ANALYSIS

Hedgcock argues that his encounter with Lutter, Eberle, and Scott, which occurred as a result of Hedgcock's entering the Platte River rest area after seeing the ruse checkpoint signs, was a seizure for purposes of the Fourth Amendment. We

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[1] See, *State v. Royer*, 276 Neb. 173, 753 N.W.2d 333 (2008); *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). See, also, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[2] See *id.*

[3] See *id.*

[4] See, *Wyche v. State*, 987 So. 2d 23 (Fla. 2008); *State v. Texter*, 923 A.2d 568 (R.I. 2007); *State v. Giebel*, 297 Wis. 2d 446, 724 N.W.2d 402 (2006); *Robinson v. Com.*, 47 Va. App. 533, 625 S.E.2d 651 (2006); *Graham v. State*, 146 Md. App. 327, 807 A.2d 75 (2002); *Vargas v. State*, 18 S.W.3d 247 (Tex. App. 2000).

[5] See *State v. Lancelotti*, 8 Neb. App. 516, 595 N.W.2d 558 (1999), citing *U.S. v. Nicholson*, 144 F.3d 632 (10th Cir. 1998).

conclude Hedgcock was not seized; thus the protections of the Fourth Amendment are inapplicable.

[2-4] It is axiomatic that for the protections of the Fourth Amendment to apply, a seizure must have occurred.[6] A police officer may make a seizure by a show of authority and without the use of physical force.[7] But there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.[8] Thus, a seizure requires either a police officer's application of physical force to a suspect or a suspect's submission to an officer's show of authority.[9]

[5] To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment, we employ the analysis set forth in *State v. Van Ackeren*,[10] which describes the three levels, or tiers, of police-citizen encounters.[11]

[6] A tier-one encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning, and does not involve any restraint of the liberty of the citizen involved.[12] In other words, one who voluntarily accompanies the police for questioning has not been seized. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.[13]

[7,8] We have explained that a seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his

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[6] See, *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). See, also, *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

[7] See *State v. Cronin*, 2 Neb. App. 368, 509 N.W.2d 673 (1993).

[8] See *id.*

[9] *Id.*

[10] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[11] See *id.*

[12] *Id.*

[13] *Id.*

or her request is required.[14] Moreover, we have concluded that a police officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.[15] In other words, a seizure does not occur simply by reason of the fact that a police officer approaches an individual, asks him or her for identification, and poses a few questions to that individual.[16]

[9,10] Conversely, tier-two and tier-three encounters are seizures sufficient to invoke the protections of the Fourth Amendment. According to *Van Ackeren*, a tier-two encounter constitutes an investigatory stop as defined by *Terry v. Ohio*.[17] Such an encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning. Because of its less intrusive nature, a tier-two encounter requires only that an officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that criminal activity is afoot.[18]

[11,12] Finally, a tier-three encounter constitutes an arrest.[19] An arrest involves a highly intrusive or lengthy search or detention.[20] The Fourth Amendment mandates that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.[21]

[13,14] A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she

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[14] *State v. Anderson, supra* note 6. See *State v. Twohig, supra* note 6.

[15] *State v. Twohig, supra* note 6.

[16] See *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

[17] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[18] See, *State v. Van Ackeren, supra* note 10; *Terry v. Ohio, supra* note 17.

[19] *State v. Van Ackeren, supra* note 10.

[20] *Id.*

[21] *Id.*

was not free to leave.[22] In addition to situations where the officer directly tells the suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.[23]

Hedgcock argues that the ruse checkpoint resulted in a de facto checkpoint at the rest area, a tier-two encounter, and that the stop was not justified by specific and articulable facts sufficient to give rise to a reasonable suspicion that criminal activity was afoot. We disagree that this was a tier-two encounter. The police did not use any force to stop the Blazer. Instead, Hedgcock stopped the Blazer on his own accord.[24] Nor did Hedgcock pull into the rest area as a result of a show of authority. There were no uniformed officers or marked police cars directing vehicles into the rest area, and there were no roadblocks. Vehicles were not stopped by officers, and the officers in no way prohibited motorists from continuing their travel. As such, we determine there was no drug checkpoint in this case.[25]

Hedgcock maintains that the facts in *U.S. v. Yousif*[26] compel the same analysis and conclusion that an unlawful seizure took place in this case. However, *Yousif* is readily distinguishable. In *Yousif*, the Eighth Circuit Court of Appeals was presented with a case where, as in the present case, ruse checkpoint signs were strategically placed to trick drug traffickers into leaving the highway at an exit ramp to avoid the perceived checkpoint. The signs indicated that a drug checkpoint was beyond the

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[22] *State v. Anderson*, *supra* note 6.

[23] *Id.*; *U.S. v. Galvan-Muro*, 141 F.3d 904 (8th Cir. 1998), citing *U.S. v. White*, 81 F.3d 775 (8th Cir. 1996), and *United States v. Mendenhall*, *supra* note 16.

[24] See *U.S. v. Klinginsmith*, 25 F.3d 1507 (10th Cir. 1994).

[25] See, *U.S. v. Wright*, 512 F.3d 466 (8th Cir. 2008); *U.S. v. Carpenter*, 462 F.3d 981 (8th Cir. 2006).

[26] *U.S. v. Yousif*, 308 F.3d 820 (8th Cir. 2002).

exit. Unlike this case, however, law enforcement officers actually established a checkpoint on the exit ramp and were under instructions to stop every vehicle that exited the highway at that exit.

In *Yousif*, when a vehicle would arrive at the checkpoint, at least one uniformed officer would approach the driver and ask for his or her driver's license, registration, and, if required by the state of registration, proof of insurance. Then, if the officers perceived any indication of illegal activity, the officer would question the driver further, and if there was any reason to believe that the vehicle contained illegal drugs or other contraband, the officer would ask for consent to search.

Salwan Yousif took the exit and was stopped at the checkpoint, and three officers approached the vehicle Yousif was driving. Yousif consented to a search of the vehicle, and the search revealed Yousif was transporting bundles of marijuana. The Eighth Circuit concluded that the district court erred in denying Yousif's motion to suppress, because the stop was not supported by reasonable suspicion.[27] Specifically, the court stated:

> [B]ecause there is nothing inherently unlawful or suspicious about a vehicle (even one with out-of-state license plates) exiting the highway, it should not be the case that the placement of signs by the police in front of the exit ramp transforms that facially innocent behavior into grounds for suspecting criminal activity.[28]

In a later case, the Eighth Circuit clarified its holding in *Yousif*, stating that exiting a highway immediately after observing signs for a checkpoint is "'indeed suspicious, even though the suspicion engendered is insufficient for Fourth Amendment purposes.'"[29] In other words, the court concluded that exiting a highway to avoid the use of a drug checkpoint is one factor which can be considered in the totality of the

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[27] *Id.*

[28] *Id.* at 829.

[29] *U.S. v. Carpenter, supra* note 25, 462 F.3d at 986.

circumstances, but that if it is the *only* cause for suspicion, it is insufficient.

It is clear that in this case, no checkpoint existed at the rest area. Vehicles were not stopped by law enforcement officers, and officers simply approached individuals, whose behaviors displayed certain suspicious indicators, for brief, nonthreatening questioning. From our review of the record, the individuals had in their possession all necessary items such as identification, driver's license, keys, et cetera, to continue traveling if so desired. Thus, there was no checkpoint.

Next, Hedgcock argues that he was seized during the encounter in which Lutter asked him questions and for consent to search. The State maintains that no seizure took place, because Hedgcock voluntarily, without being coerced, agreed to answer questions. We agree with the State.

Considering the totality of the circumstances, we find that a reasonable person would have felt free to leave; thus, there were no circumstances present in this case which are indicative of a seizure. There were no more than three officers visible to Hedgcock at any point prior to his admissions. All of the officers at the rest area were dressed in plain clothing, and none of the officers displayed their weapons. The officers did not physically compel cooperation in any way.

Additionally, Lutter did not indicate that compliance with his request to answer questions would be compelled. Lutter did not summon Hedgcock to his presence, but instead Lutter approached Hedgcock and identified himself. When Lutter first spoke with Hedgcock, Lutter's tone of voice was "[s]trictly conversational, there was no direction, it was just a conversation tone." Almost immediately, Lutter informed Hedgcock that he was not under arrest or in any kind of trouble. Lutter simply asked Hedgcock "if he had a few minutes to speak with me." And Hedgcock responded, "Okay."

Moreover, it is clear that Hedgcock had everything in his possession that he would need to continue his trip. Lutter requested, but did not demand, Hedgcock's identification, and after checking Hedgcock's identification, Lutter immediately returned his driver's license back to him. Hedgcock was free

to walk away at any time. There is nothing to indicate that this encounter was intense or threatening.

To sum up, the record reveals that Hedgcock voluntarily cooperated and consented to a search of the Blazer and his person. Lutter asked Hedgcock, in a conversational tone, whether he could search the vehicle, and Hedgcock responded, "Go ahead." At the time Lutter asked for consent to search the Blazer, no other officers were around. Additionally, there is no evidence of any kind of coercive conduct on the part of the officers. Lutter did not make any demands of Hedgcock, and throughout this short encounter, Hedgcock never manifested any indication that he no longer wanted to cooperate with the officers. Hedgcock never asked whether he was free to leave, and he never made any attempts to leave. Hedgcock fully cooperated with the police officers.

Based on these facts, we see no reason to conclude that a reasonable person in Hedgcock's position would not have felt free to decline the request to answer questions or to search.

But Hedgcock argues that an encounter that occurs as a result of a ruse checkpoint is inherently unreasonable and coercive. Hedgcock argues that his initial cooperation was involuntary because he was forced to cooperate. According to Hedgcock, if he refused to cooperate and then was allowed to leave, he would have been stopped at the checkpoint. But if he cooperated, he might be released without being stopped again at the checkpoint.

[15,16] We have held that police deception which is not coercive in nature will not invalidate an individual's consent to search if the record otherwise shows the consent was voluntary.[30] Although the officers misrepresented the fact that a drug checkpoint was beyond the rest area, there was nothing in the record to reveal that the officers coerced Hedgcock into answering questions or consenting to a search of the Blazer. And as we discussed above, the officers did not force Hedgcock into stopping at the rest area and none of the officers indicated in any way that cooperation would be compelled. We determine that the use of a ruse checkpoint, without an unreasonable

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[30] *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986).

seizure for Fourth Amendment purposes, is not unconstitutional simply because it is a ruse. As such, we conclude that Hedgcock voluntarily consented.

CONCLUSION

We conclude that the encounter between Lutter and Hedgcock did not rise to the level of a Fourth Amendment seizure. Because there was no seizure, there was no checkpoint and the safeguards against unreasonable searches and seizures were not implicated. Further, we determine that Hedgcock voluntarily cooperated and consented to the search of his vehicle and person. Therefore, we conclude the district court correctly denied Hedgcock's motion to suppress, and thus, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ALECIA M. HAUSMANN, APPELLANT.
765 N.W.2d 219

Filed May 22, 2009. No. S-07-1229.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Courts.** Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system.
3. **Courts: Jurisdiction: Appeal and Error.** A district court sitting as an appellate court is divested of jurisdiction to a higher appellate court when an appeal is perfected, or to the county court when the county court acts upon the mandate issued by the district court.
4. **Courts: Jurisdiction: Final Orders: Appeal and Error.** While an intermediate appellate court still has jurisdiction over an appeal, it has the inherent power to vacate or modify a final judgment or order.
5. **Motions to Vacate: Final Orders: Time: Appeal and Error.** In the absence of an applicable rule to the contrary, a motion asking an appellate court to exercise its inherent power to vacate or modify a final judgment or order does not toll the time for taking an appeal.
6. **Appeal and Error.** Overruling precedent is justified when the purpose is to eliminate inconsistency.
7. ____. Remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it.

8. **Case Disapproved.** *State v. Dvorak*, 254 Neb. 87, 574 N.W.2d 492 (1998), is disapproved.
9. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and CASSEL, Judges, on appeal thereto from the District Court for Sarpy County, MAX KELCH, Judge, on appeal thereto from the County Court for Sarpy County, TODD J. HUTTON, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Alecia M. Hausmann appealed from her conviction and sentence for being a minor in possession of alcohol, but the Nebraska Court of Appeals dismissed her appeal on jurisdictional grounds.[1] The issue presented in this petition for further review is whether a district court, sitting as an appellate court, has the authority to rehear an appeal.

BACKGROUND

Hausmann was charged by complaint in the county court with being a minor in possession of alcohol, a Class III misdemeanor.[2] Hausmann filed a motion to suppress, which the court overruled. The case proceeded to a bench trial on a stipulated record, preserving the motion to suppress and Hausmann's motion to dismiss for insufficient evidence. Hausmann was convicted of being a minor in possession and sentenced to pay a $250 fine. She appealed to the district court.

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[1] *State v. Hausmann*, 17 Neb. App. 195, 758 N.W.2d 54 (2008).

[2] See Neb. Rev. Stat. §§ 53-180.02 and 53-180.05 (Reissue 2004).

On September 10, 2007, the district court entered an order dismissing the appeal, because the record was inadequate for appellate review. The court noted that the county court transcript contained neither an order finding Hausmann guilty nor a sentencing order. And the court noted that Hausmann's praecipe for transcript had not requested those orders. Because the transcript did not contain the final judgment of the county court, the district court dismissed the appeal.

On September 28, 2007, Hausmann moved the district court to vacate the September 10 dismissal and permit the correction of the record through the filing of a supplemental transcript. The district court granted the motion on October 5 and vacated the September 10 dismissal order. On October 9, a supplemental transcript was filed containing the conviction and sentencing orders. On October 22, the district court entered an order affirming Hausmann's conviction and sentence on the merits. On November 21, Hausmann filed her notice of appeal to the Court of Appeals.

The Court of Appeals dismissed Hausmann's appeal as untimely filed. The court reasoned that if the district court lacked jurisdiction to vacate its order of September 10, 2007, then the September 10 order had been final and appealable. If Hausmann's motion to vacate did not toll the time for taking an appeal, then her November 21 notice of appeal was untimely. The Court of Appeals found contradicting authority from this court regarding the district court's jurisdiction to rehear an appeal, but concluded that our more recent authority supported the conclusion that the district court had no power, when sitting as an appellate court, to rehear its decisions.[3]

Thus, the Court of Appeals concluded that the district court lost jurisdiction over the appeal when it entered the September 10, 2007, order. The court determined that the subsequent district court proceedings were a nullity and did not toll the time for Hausmann to file her notice of appeal. The Court of Appeals dismissed Hausmann's appeal,[4] and we granted her petition for further review.

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[3] See *Hausmann*, *supra* note 1.

[4] See *id.*

ASSIGNMENT OF ERROR

Hausmann assigns, as restated, that the Court of Appeals erred in concluding it had no appellate jurisdiction.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[5]

ANALYSIS

The issue presented on further review, as discussed above, is whether the district court had jurisdiction to vacate its September 10, 2007, order dismissing Hausmann's appeal and decide the appeal on different grounds. The Court of Appeals found two lines of authority from this court relevant to that issue and was unable to reconcile them.[6]

The Court of Appeals first cited *State v. Painter*,[7] and *Interstate Printing Co. v. Department of Revenue*,[8] in which we held that a district court sitting as an intermediate court of appeals has the power to modify its previous final order. In *Painter*, as in this case, the defendant appealed from a criminal conviction in the county court, and the district court affirmed. But the district court's order misstated the sentences being affirmed, and the district court entered another order correcting the mistake.[9]

On appeal to this court, we rejected the defendant's argument that the district court lacked jurisdiction to enter the second order, noting that the district court was not the sentencing court, but was acting as an intermediate appellate court. We stated that the district court's second order was not an order nunc pro tunc, because it was caused by a misstatement by the judge, but that "[t]here was simply no error in the district court's modifying its earlier order . . . ."[10] We explained that

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[5] *Dominguez v. Eppley Transp. Servs.*, *ante* p. 531, 763 N.W.2d 696 (2009).

[6] See *Hausmann*, *supra* note 1.

[7] *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987).

[8] *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990).

[9] *Painter*, *supra* note 7.

[10] *Id.* at 912, 402 N.W.2d at 682.

"just as the Supreme Court may, on a motion for rehearing, timely modify its opinion, an intermediate appellate court may also timely modify its opinion."[11]

But in *In re Guardianship and Conservatorship of Sim*,[12] we found no "authorization for a motion for rehearing in such circumstances" and held that a motion for rehearing did not toll the time for further appeal. And more recently, in *State v. Dvorak*,[13] we decided that a district court sitting as an intermediate appellate court lacked subject matter jurisdiction to hear a motion for reconsideration after the entry of a final order, explaining that the second order was void and not appealable, because the district court was "divested of jurisdiction" upon issuing the first order. And most recently, in *Goodman v. City of Omaha*,[14] we held that where the district court was acting as an intermediate appellate court, a motion to alter or amend the judgment[15] did not toll the time for taking an appeal to a higher appellate court.[16]

The Court of Appeals explained that it was unable to reconcile these lines of authority. The court concluded that "[w]hile it would seem sensible that the district court, when it acts as an intermediate appellate court, should have the same ability to reconsider its own decisions . . . as do the higher appellate courts," the more recent decisions of this court had concluded otherwise.[17] Thus, the Court of Appeals concluded that Hausmann's appeal was untimely and should be dismissed.

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[11] *Id.* at 912, 402 N.W.2d at 681.

[12] *In re Guardianship and Conservatorship of Sim*, 233 Neb. 825, 826, 448 N.W.2d 406, 407 (1989).

[13] *State v. Dvorak*, 254 Neb. 87, 90, 574 N.W.2d 492, 494 (1998).

[14] *Goodman v. City of Omaha*, 274 Neb. 539, 742 N.W.2d 26 (2007).

[15] See Neb. Rev. Stat. § 25-1329 (Reissue 2008).

[16] *Goodman, supra* note 14. Accord *Timmerman v. Neth*, 276 Neb. 585, 755 N.W.2d 798 (2008). See, also, e.g., *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993); *Collection Bureau of Lincoln v. Loos*, 233 Neb. 30, 443 N.W.2d 605 (1989); *State v. Deutsch*, 2 Neb. App. 186, 507 N.W.2d 681 (1993).

[17] *Hausmann, supra* note 1, 17 Neb. App. at 202, 758 N.W.2d at 59.

[2] We recognize that this court's conflicting authority placed the Court of Appeals in a difficult position, and we find no fault with the Court of Appeals' conclusion that stare decisis compelled it to abide by its understanding of our more recent decisions. Vertical stare decisis compels lower courts to follow strictly the decisions rendered by higher courts within the same judicial system.[18] But we agree with the Court of Appeals' observation that a district court, acting as an intermediate appellate court, should have the ability to reconsider its own decisions. And we conclude that it does.

To begin with, it is important to clarify the difference between two related, but analytically distinct issues: whether the district court has jurisdiction to rehear an appeal on which a final order has been entered, and whether a motion asking the court to exercise such jurisdiction tolls the time for taking an appeal. The decisions in *Goodman* and *In re Guardianship and Conservatorship of Sim*, and the other cases cited above, involved circumstances in which the district court *overruled* a motion to change its disposition of the appeal.[19] Thus, the district court's power to modify its earlier order was not at issue. Instead, the question in those cases was whether the time for filing a notice of appeal had been tolled by the appellant's motion.

The issue here is different, because in this case, the district court vacated its earlier order and entered a new order disposing of the appeal. There is no question that Hausmann could appeal within 30 days of the district court's new final order, if the court had the power to enter such an order.[20] We held in *Dvorak* that the court did not have such power.[21] But we conclude that our decision in *Dvorak* was incorrect.

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[18] See *Pogge v. American Fam. Mut. Ins. Co.*, 13 Neb. App. 63, 688 N.W.2d 634 (2004).

[19] See, *Timmerman*, *supra* note 16; *Goodman*, *supra* note 14; *Hueftle*, *supra* note 16; *In re Guardianship and Conservatorship of Sim*, *supra* note 12; *Deutsch*, *supra* note 16.

[20] See, *Interstate Printing Co.*, *supra* note 8; Neb. Rev. Stat. § 25-1912 (Reissue 2008).

[21] See *Dvorak*, *supra* note 13.

In *Dvorak*, the defendant filed an application to set aside her conviction upon completion of her probation.[22] The county court granted the application, but the State appealed. The district court initially entered an order reversing the decision of the county court. But the defendant filed a "motion to reconsider," and the district court sustained that motion and entered another order affirming the county court's order.[23] The State appealed to this court. We held that the district court lacked jurisdiction to enter the second order, explaining that

> we do not find any statute or court rule which allows for a rehearing in the district court after the district court has made its ruling . . . . Just as a motion for new trial does not toll the time for appeal when a district court is acting as an appellate court, neither does a motion to reconsider. As a result, the district court's exercise of subject matter jurisdiction over [the defendant's] motion for reconsideration was without statutory authority. Therefore, we hold that the order [reversing the county court's decision] was the district court's final disposition of the appeal and that the district court was divested of jurisdiction over the matter upon that order.[24]

[3] But our reasoning was erroneous. We conflated whether the defendant's motion *was a tolling motion* with whether the district court *had the power* to sustain the motion. The fact that a motion may not toll the time for taking an appeal does not mean that the motion cannot be sustained. And we neglected well-established law distinguishing between the finality of an order for purposes of appeal and the lower court's appellate jurisdiction over the case. It is well established that it is not the entry of a final order or judgment that divests the district court of jurisdiction in such an instance. Rather, a district court sitting as an appellate court is divested of jurisdiction to a higher appellate court when an appeal is perfected,[25] or to the county

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[22] See Neb. Rev. Stat. § 29-2264 (Reissue 2008).

[23] See *Dvorak, supra* note 13, 254 Neb. at 89, 574 N.W.2d at 493.

[24] *Id.* at 90, 574 N.W.2d at 494.

[25] See *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997).

court when the county court acts upon the mandate issued by the district court.[26] We should not have suggested that the district court's entry of a final order, standing alone, divested the court of jurisdiction.

And fundamentally, we erred in finding no authority for the district court, sitting as an appellate court, to modify its previous order. We overlooked our decisions to the contrary in *Painter* and *Interstate Printing Co.*[27] In particular, we overlooked our reasoning in *Interstate Printing Co.*, in which we relied on the district court's inherent power to vacate or modify its judgments or orders, either during the term at which they were made, or upon a motion filed within 6 months of the entry of the judgment or order.[28] And, as noted by the Court of Appeals in this case, our holding in *Painter* that "an intermediate appellate court may also timely modify its opinion"[29] is consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction.[30]

We are not persuaded by the State's argument that *Painter* and *Interstate Printing Co.* are distinguishable from *Dvorak*, because, according to the State, they involved internally inconsistent orders. Our opinions do not support the State's suggested distinction. In *Dvorak*, we did not cite our earlier decisions on this issue, much less expressly distinguish them. In *Painter*, the order of affirmance that the district court corrected was not defective or void—it was simply incorrect.[31] And similarly, in *Interstate Printing Co.*, we specifically said that the

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[26] See *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

[27] See, *Interstate Printing Co., supra* note 8; *Painter, supra* note 7.

[28] See, *Interstate Printing Co., supra* note 8; Neb. Rev. Stat. § 25-2001(1) (Reissue 2008).

[29] *Painter, supra* note 7, 224 Neb. at 912, 402 N.W.2d at 681.

[30] See, generally, 5 C.J.S. *Appeal and Error* § 1113 (2007). See, e.g., *Miss. State Highway Comm. v. Herring*, 241 Miss. 729, 133 So. 2d 895 (1961); *Folding Furniture Works v. Wisconsin L. R. Board*, 232 Wis. 170, 286 N.W. 875 (1939).

[31] *Painter, supra* note 7.

court had acted to correct a "judicial error."[32] In other words, contrary to the State's argument, our decisions in *Painter* and *Interstate Printing Co.* rested on the well-established rule that an appellate court has the inherent power to reconsider its own rulings.

[4,5] And that rule makes sense. Judicial efficiency is served when any court, including an intermediate appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or correct its own mistakes.[33] We conclude that *Painter* and *Interstate Printing Co.* represent correct statements of the law, and reaffirm our holding in those cases that while an intermediate appellate court still has jurisdiction over an appeal, it has the inherent power to vacate or modify a final judgment or order.[34] We emphasize, however, that in the absence of an applicable rule to the contrary, a motion asking the court to exercise that inherent power does not toll the time for taking an appeal.[35] A party can move the court to vacate or modify a final order—but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it.[36] And if an appeal is perfected before the motion is ruled upon, the district court loses jurisdiction to act.[37]

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[32] *Interstate Printing Co., supra* note 8, 236 Neb. at 115, 459 N.W.2d at 523.

[33] Cf., *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004); *Mid City Bank v. Omaha Butcher Supply*, 222 Neb. 671, 385 N.W.2d 917 (1986); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984); *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

[34] See, *Interstate Printing Co., supra* note 8; *Painter, supra* note 7.

[35] See, *Timmerman, supra* note 16; *Goodman, supra* note 14; *Hueftle, supra* note 16; *In re Guardianship and Conservatorship of Sim, supra* note 12; *Deutsch, supra* note 16. Compare *Interstate Printing Co., supra* note 8 (holding when judgment is amended, time for appeal runs from entry of amended judgment).

[36] See, *id.*; § 25-1912.

[37] See *Billups, supra* note 25.

[6-8] *Dvorak* is inconsistent with that holding.[38] While the doctrine of stare decisis is entitled to great weight,[39] it is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment.[40] Overruling precedent is justified, however, when the purpose is to *eliminate* inconsistency.[41] And remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it.[42] Therefore, *State v. Dvorak* is disapproved.[43]

As noted above, a district court acting as an intermediate appellate court is divested of jurisdiction either when an appeal to a higher appellate court is perfected or when a lower court acts upon the district court's mandate. In this case, obviously, no appeal had been perfected from the district court's September 10, 2007, order. And on an appeal from the county court, the district court is to issue a mandate within 2 judicial days after the decision of the district court becomes final; that is, within 2 judicial days after the 30-day appeal time from the court's decision has run.[44] In this case, the district court vacated the September 10 order on October 5, before it had become final—obviously, a mandate had neither issued nor been acted upon by the county court.

The record establishes that at the time it vacated the September 10, 2007, order, the district court still had

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[38] See *Dvorak, supra* note 13.

[39] See *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[40] See *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996) (Connolly, J., concurring in result), *disapproved on other grounds, State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007).

[41] See, e.g., *State v. Gautier*, 871 A.2d 347 (R.I. 2005); *Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004); *Newman v. Erie Ins. Exchange*, 256 Va. 501, 507 S.E.2d 348 (1998); *Mayhew v. Mayhew*, 205 W. Va. 490, 519 S.E.2d 188 (1999).

[42] *Mayhew, supra* note 41.

[43] See *Dvorak, supra* note 13.

[44] See, Neb. Rev. Stat. § 25-2733 (Cum. Supp. 2006); *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000).

jurisdiction to exercise its inherent power, as an intermediate appellate court, to vacate its previous ruling. And Hausmann timely appealed within 30 days of the district court's October 22 order.[45] Therefore, we find merit to Hausmann's assignment of error on further review.

[9] We recognize that upon reversing a decision of the Nebraska Court of Appeals, we may consider, if appropriate, some or all of the assignments of error that the Court of Appeals did not reach.[46] In this case, however, the Court of Appeals did not proceed past the jurisdictional issue presented, and neither of the State's briefs has discussed the underlying merits of the appeal. We conclude that those issues should be briefed by the State and addressed by the Court of Appeals in the first instance.

CONCLUSION

The decision of the Court of Appeals is reversed, and the cause remanded to the Court of Appeals for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

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[45] See *Interstate Printing Co., supra* note 8.

[46] *Incontro v. Jacobs, ante* p. 275, 761 N.W.2d 551 (2009).

THE COUNTY OF SARPY, NEBRASKA, A BODY CORPORATE AND POLITIC, APPELLEE AND CROSS-APPELLANT, V. THE CITY OF PAPILLION, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

765 N.W.2d 456

Filed May 22, 2009. No. S-08-166.

1. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.

3. **Standing: Counties: Annexation.** If a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.
4. **Municipal Corporations: Annexation.** A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do.
5. **Municipal Corporations: Annexation: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it.
6. **Annexation: Ordinances: Proof.** The burden is on one who attacks an annexation ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.
7. **Municipal Corporations: Statutes: Annexation.** Cities of the first class are given authority under chapter 16 of the Nebraska Revised Statutes, and specifically Neb. Rev. Stat. § 16-117 (Reissue 2007), to extend their city limits, subject to certain limitations.
8. **Annexation: Words and Phrases.** The terms contiguous and adjacent in annexation statutes are synonymous.
9. ____: ____. The terms contiguous and adjacent mean "adjoining," "touching," and "sharing a common border."
10. **Annexation: Statutes.** In order to satisfy the requirements of Neb. Rev. Stat. § 16-117 (Reissue 2007), the boundaries must be "sufficiently" or "substantially" joined together.
11. **Municipal Corporations: Annexation.** Substantial adjacency between a municipality and annexed territory exists when a substantial part of the connecting boundary of the annexed land is adjacent to a segment of the boundary of the city or village.
12. ____: ____. A municipality may annex several tracts as long as one tract is substantially adjacent to the municipality and the other tracts are substantially adjacent to each other.
13. **Municipal Corporations.** As to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.
14. **Municipal Corporations: Annexation: Highways.** The annexation of a portion of a highway extending away from the municipality, connected only by the width of that highway, is an invalid strip or corridor annexation.
15. **Ordinances.** Generally, the partial invalidity of an ordinance does not necessarily make the remaining provisions of the ordinance ineffective.
16. ____. If a city ordinance contains valid and invalid provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Michael N. Schirber, of Schirber & Wagner, L.L.P., for appellant.

L. Kenneth Polikov, Sarpy County Attorney, Michael A. Smith, and Kerry A. Schmid for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

The County of Sarpy, Nebraska (Sarpy), challenged two ordinances passed by the City of Papillion, Nebraska (Papillion), that purported to annex land and portions of several streets, including Highway 370. Sarpy also challenged the ordinance that redrew the zoning area for Papillion as a result of the newly acquired land. Sarpy alleged that the annexations were null and void and that an injunction should be issued against the ordinances, because the properties were not contiguous to the municipality, as required by Neb. Rev. Stat. § 16-117 (Reissue 2007). Papillion disagreed and argued that Sarpy lacked standing to bring its challenge.

The district court found all parts of the annexations to be adequately contiguous, with the exception of two "tails" running the approximate width of two roads traveling away from the farthest ends of larger annexation areas. Because the land in ordinance No. 1527 was described altogether in a single paragraph, the court found the entirety of that ordinance to be ineffective. Because ordinance No. 1526 involved more complex descriptions of four separate areas, one being simply the tail, the court found that tail to be severable from the remainder of the ordinance and found that ordinance enforceable with the exception of the paragraph describing the tail. The court granted a permanent injunction consistent with these conclusions, but did not specifically state in its conclusion that any ordinance was null and void. Papillion appeals, and Sarpy cross-appeals.

FACTS

Appendix A to this opinion is a map of Papillion and the proposed annexations. Papillion, shown in the area shaded light gray, is shaped like a rectangular puzzle piece. Especially on the west and east sides, Papillion's border does not run in

a smooth line. Papillion passed ordinance No. 1526 to annex land and roads to the west and southwest of the city. It passed ordinance No. 1527 to add land and portions of a road directly to the south of the city limits. Ordinance No. 1529 did not annex any property, but simply changed the official zoning map of the city to reflect the newly annexed areas.

The area to be annexed by ordinance No. 1526 is a complex shape and was described in four separate metes and bounds descriptions. First, the ordinance sought to annex Highway 370, along with varying degrees of land surrounding Highway 370, from 84th Street to a point west of 96th Street, shown in the map as 1526, section "A." Portions of Highway 370 were already part of Papillion as it ran from the east end through the city. This part of ordinance No. 1526 sought domain over Highway 370 as it continued to run adjoining along the north side of a jagged southern edge of the city. It also sought to annex the highway as it ran approximately a quarter mile from one part of the city to another.

After passing this most southwestern point of the previous city limits, near 96th Street, the area to be annexed expands beyond simply the highway corridor, into an approximate quarter-mile-wide parcel labeled section "B," filling in gaps between the jagged edges of the city. This quarter-mile area continues west and becomes part of a large square shape, section "E," that encompasses the Walnut Creek Lake and Recreation Area and the Papillion-La Vista South High School.

After 108th Street, the square, section E, ends, and the area to be annexed becomes simply a corridor around Highway 370 as it continues west away from Papillion for approximately 4 miles until it reaches Interstate 80. This highway corridor, designated on the map as section "F," is described in a single metes and bounds description in the second paragraph of the ordinance.

Back toward the preexisting city limits, to the north of Highway 370, ordinance No. 1526 sought to annex approximately 1.4 miles of 96th Street as it runs parallel to the city until it reaches a portion of 96th Street already part of Papillion. This area is referred to in the map as section "C."

Finally, ordinance No. 1526 sought to annex First Street from an eastern point deep inside and completely surrounded by the city limits, through an approximate quarter-mile corridor not touching city land, but then reconnecting alongside the city at its most western point. This portion of the annexation is designated in the map as section "D."

The area sought to be annexed by ordinance No. 1527 was simpler. It is a triangular area of land bordered on its north side by approximately one-half mile of the southern limits of the city, and another side on the west side by 84th Street. This is shown on the map as 1527, section "A." But the ordinance also sought to annex what is shown on the map as section "B": the 84th Street corridor running almost three-quarters of a mile beyond the corner of the triangle until reaching Capehart Road. All of the property to be annexed was described in ordinance No. 1527 as a single area, with a single metes and bounds description set forth in a single paragraph.

Sarpy filed a complaint with the district court asking that it issue a temporary injunction prohibiting enforcements of ordinances Nos. 1526, 1527, and 1529 and that upon a final hearing, the court permanently enjoin Papillion from implementing the annexations. Sarpy also asked that the court declare these ordinances null, void, and of no legal effect. The parties stipulated that ordinances Nos. 1526 and 1527 complied with Neb. Rev. Stat. § 16-405 (Reissue 2007) and that the language of the ordinances was sufficient to effectuate the annexation of the described tracts. The dispute thus centered on whether the areas to be annexed were "adjacent" to the city, as required by § 16-117(1).

At trial, Sarpy presented witnesses and affidavits testifying to the fact that the annexation of these areas by Papillion would cause the Sarpy County building and planning departments to lose approximately 25 percent of their revenue because of lost zoning administration and development administration fees. And it presented maps, drawn to scale, reflecting the areas sought to be annexed. Papillion presented the testimony of Arthur Beccard, a professional engineer, who concluded that the areas described in the ordinances were "adjacent" to the city. Beccard stated that the length of the adjacency of the

land described in ordinance No. 1526 was 3.59 miles and that the length of the adjacency of the land in ordinance No. 1527 was .48 miles, although he did not testify in any detail as to the areas measured. Beccard also described the land to be annexed by ordinance No. 1526, including the three-quarter-mile corridor of 84th Street, as a single "tract" of land. Beccard explained that some of the gaps in the annexation areas were agricultural lands.

The district court concluded that ordinance No. 1526 was a lawful annexation with the exception of the Highway 370 tail, section F of the appendix A map. The court concluded that because the tail was described separately in the ordinance, it could be severed from the rest of the ordinance. The court found the 84th Street tail, section B of 1527 on the map, also violated the statutory adjacency requirements. But because the land to be annexed by ordinance No. 1527 was described as a single unit, the court concluded that the entirety of that ordinance was unlawful. The court granted a permanent injunction as to the entirety of ordinance No. 1527 and as to the second paragraph of ordinance No. 1526. Papillion appeals, and Sarpy cross-appeals.

ASSIGNMENTS OF ERROR

Papillion asserts that the district court erred in granting Sarpy a permanent injunction as to part of ordinance No. 1526 and as to ordinance No. 1527.

Sarpy cross-appeals, asserting that the district court (1) erred in failing to declare the ordinances null and void, rather than simply ordering a permanent injunction, and (2) erred in not enjoining the entirety of ordinance No. 1526.

STANDARD OF REVIEW

[1,2] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.[1] On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both

[1] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

fact and law, is obligated to reach a conclusion independent of the trial court's determination.[2]

DISCUSSION

STANDING

[3] First, we address Papillion's allegation that Sarpy lacked standing to bring this action for temporary and permanent injunctions. In *County of Sarpy v. City of Gretna*,[3] we held that a county's governmental function is a legally protectable interest and that annexation of county property by a city infringes upon, in a variety of ways, that function. Therefore, we said, if a county alleges that a city, through an unlawful annexation plan, has encroached upon its governmental function, it has alleged an injury sufficient to give it standing to challenge the annexation plan.[4] In this case, Sarpy has illustrated that its governmental functions are infringed upon by the annexations, both fiscally and in other ways. We find that Sarpy has standing in this suit.

We thus consider whether the district court was correct in its evaluation of what was and was not a valid annexation by the ordinances. In essence, Papillion asserts that all of the annexations were proper and that the district court should not have granted Sarpy any injunction, while Sarpy asserts that all the annexations were improper and that Papillion should have been enjoined from enforcing any portion of any of the ordinances.

ADJACENCY

[4-6] Papillion is a municipal corporation, or city, of the first class. A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do.[5] The power delegated to municipal corporations

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[2] *Id.*

[3] *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

[4] *Id.*

[5] *Doolittle v. County of Lincoln*, 191 Neb. 159, 214 N.W.2d 248 (1974).

to annex territory must therefore be exercised in strict accord with the statute conferring it.[6] The burden is on one who attacks an annexation ordinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.[7]

[7] Cities of the first class are given authority under chapter 16 of the Nebraska Revised Statutes, and specifically § 16-117, to extend their city limits, subject to certain limitations.[8] Sarpy argues that ordinances Nos. 1526, 1527, and 1529 are invalid in their entirety because the land described was not substantially adjacent to the city as required by § 16-117, but instead contained unlawful "strip" annexations.[9] Papillion generally denies this characterization and argues that the conclusions of its expert witness were unrebutted by Sarpy. We note at the beginning that we give no weight to Beccard's conclusions as to whether the annexation areas were "adjacent" as required by § 16-117(1) or whether they were "tracts" of land as also described by chapter 16. Rather, we agree with Sarpy that the maps speak for themselves, and it is up to the courts to determine whether the areas shown by the maps, and otherwise physically described by expert testimony, satisfy the legal requirements set forth by chapter 16.

Section 16-117(1) states generally that the mayor and city council of a city of the first class may, by ordinance, "at any time include within the corporate limits of such city any *contiguous or adjacent* lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper." (Emphasis supplied.) The city is specifically prohibited from annexing "agricultural lands which are rural in character."[10] Contiguity or adjacency is also not specifically defined by statute, but Neb. Rev. Stat. § 16-118 (Reissue

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[6] *County of Sarpy v. City of Gretna*, 273 Neb. 92, 727 N.W.2d 690 (2007).

[7] See *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds*, *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[8] § 16-117.

[9] Brief for appellee at 12.

[10] § 16-117(1).

2007) states that "[l]ands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than two hundred feet wide lies between the same and the corporate limits."

[8-12] We have held that the terms contiguous and adjacent in annexation statutes are synonymous.[11] The terms mean "adjoining," "touching," and "sharing a common border."[12] We have also explained that in order to satisfy the requirements of § 16-117, the entirety of the connecting boundary need not be touching. Instead, the boundaries must be sufficiently or substantially joined together.[13] We have held that "'[s]ubstantial adjacency'" between a municipality and annexed territory exists when a substantial part of the connecting boundary of the annexed land is adjacent to a segment of the boundary of the city or village.[14] A municipality may annex several tracts as long as one tract is substantially adjacent to the municipality and the other tracts are substantially adjacent to each other.[15]

[13] We have explained that the root of the adjacency requirement is the idea that a city, both by name and use, is one entity, a collective body of people gathered together in one mass, not separated into distinct masses, and having a community of interest because they are residents of the same place.[16] So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation.[17]

[14] So-called "strip" or corridor" annexations do not comport with either adjacency requirements or the idea of a unified

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[11] See, e.g., *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005).

[12] Concise Oxford American Dictionary 11, 196 (2006).

[13] See *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952).

[14] *Swedlund v. City of Hastings*, 243 Neb. 607, 611, 501 N.W.2d 302, 305 (1993).

[15] *City of Elkhorn v. City of Omaha*, *supra* note 1.

[16] *Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954). See, also, *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992).

[17] *Id.*

municipal entity. In *Johnson v. City of Hastings*,[18] the city annexed a 120-foot-wide strip of highway to reach a larger tract of land containing a community college campus. The annexed tract was shaped like a "saucepan," with the handle attached perpendicular to the city. We explained that the annexation of a portion of a highway extending beyond the border of a municipality, connected only by the width of that highway, was an invalid strip or corridor annexation.[19] Since the boundaries of the tract sought to be annexed were not substantially adjacent to the city's corporate limits, the annexation was improper and the ordinance was null and void.

Likewise, in *Cornhusker Pub. Power Dist. v. City of Schuyler*,[20] we concluded that the city's annexation ordinance was null and void when it sought to annex a U-shaped strip as it wrapped around a large county industrial tract until the strip could reach and annex a 26-acre rectangular tract on the other side of the county tract. While the approximately 30-foot-wide strip began parallel and adjacent to the boundaries of the city, it continued past the city limits for some length, changing directions and continuing even farther away from the city, and then turned up, running parallel to the city on the other side of the industrial tract. The 26 acres then bulged out from the final length of the strip like a flag on a flagpole. In total, the strip was approximately 1¼ miles long. We explained that there was insufficient adjacency between any of the annexed tracts and the existing corporate limits of the city to uphold the validity of any portion of the ordinance.

Most recently, in *County of Sarpy v. City of Gretna*,[21] we found two ordinances void when each only sought to annex strips of highway running perpendicular away from the city limits. The city argued that these were not unlawful strip annexations because the annexed strips were not just a means to

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[18] *Johnson v. City of Hastings, supra* note 16. See, also, *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933).

[19] *Johnson v. City of Hastings, supra* note 16.

[20] *Cornhusker Pub. Power Dist. v. City of Schuyler, supra* note 11.

[21] *County of Sarpy v. City of Gretna, supra* note 6.

reach a larger, sought-after property. We rejected this argument, however, explaining: "The invalidity of a strip annexation is not based upon the existence of a larger tract at the distal end of the strip, but, rather, upon the lack of substantial adjacency where the proximal end meets the corporate limits of the city."[22] We also stated that the shape of the tract to be annexed was not, in itself, determinative of whether it can be lawfully annexed, but that the lack of substantial adjacency was. Despite recognizing that the city may have had legitimate reasons to annex the highways for its planning and land-use control objectives, we found that there was not substantial adjacency when the connecting points consisted "merely of the width of the highway right-of-way."[23]

But so long as a substantial part of the connecting boundary touches the corporate limits, an annexation will not be void simply because parts of the connecting side do not touch the city or because portions of the annexed territory are narrower than the rest. In *Swedlund v. City of Hastings*,[24] for instance, we rejected the property owners' argument that the annexation of a larger residential tract was improperly reached by a "narrow strip" and that the annexation was void for its failure to be adjacent to the city limits.[25] While the abutting property may have been narrower than the other properties connecting to it, we explained that this narrower corridor was, in fact, approximately six blocks wide and was therefore not a "strip" at all. Moreover, the entire boundary of the width of the corridor was adjoining the preannexation corporate boundary. The other properties annexed were, in turn, contiguous to different parts of the six-block-wide corridor. Thus, considering the annexation area as a whole, we found that it satisfied the contiguity and adjacency requirements of the applicable annexation statute.

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[22] *Id.* at 98, 727 N.W.2d at 695.

[23] *Id.*

[24] *Swedlund v. City of Hastings*, *supra* note 14.

[25] *Id.* at 611, 501 N.W.2d at 305-06.

Sarpy does not contest the contiguity of the main bodies of the two annexation areas identified in the appendix A map, section A of 1527 and section E of 1526. But it argues that in addition to the 4-mile tail along Highway 370, parts of sections A and C of 1526 are unlawful where they fail to touch the city limits. Sarpy also argues that under *Wagner v. City of Omaha*,[26] the court should have found the entirety of ordinance No. 1526 void, because the section B tail identified in the map was not severable from the rest of the ordinance.

As for the arms of sections A and C of 1526, we agree with the district court that Sarpy has failed to show how these defeat the annexation's contiguity to the city. The arms radiate out from either side of a larger area that is touching the city almost the entirety of two sides of its roughly rectangular shape. The arms then run flush alongside the city, with an approximately one-third length of nontouching "bridge" on the Highway 370 arm and an approximately one-half length of nontouching "bridge" on the 96th Street arm. But in both instances, the "bridges" run parallel to some part of the city and are no more than approximately 1,250 feet from that parallel border.

The apparent object of these arms is to further the contiguity and unity of the city's borders by filling in gaps of the city's irregular shape. Through the annexations, the city also seeks domain over easily identifiable lengths of road, rather than disparate smaller lengths. These arms connect the city together and make it more cohesive. The simple fact that there is some length of nontouching highway right-of-way does not make an annexation invalid for failure to be substantially adjacent to the city. Viewed together with the larger tracts annexed by ordinance No. 1526 and the points before and after these parallel "bridges" which reconnect with the city, we do not find these areas to be in violation of § 16-117.

But we agree with Sarpy and the district court that the tails created by each ordinance, section F of 1526 and section B of 1527, are inconsistent with the contiguity and adjacency

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[26] *Wagner v. City of Omaha, supra* note 13.

requirements of § 16-117 and cannot be considered part of the cohesive whole otherwise created by these annexations. Papillion points out that, unlike other cases considered by our court, the ordinances do not seek to annex simply the road corridors or reach out to a larger target of the annexation. But the fact remains that these strips are attached perpendicularly to the newly annexed larger corporate boundaries merely by their width. Furthermore, they stretch away from the city. As we explained in *City of Gretna*,[27] when a long strip runs perpendicularly away from the city attached by only the width of one end, it cannot be considered substantially adjacent. This understanding of what is substantially adjacent is not changed by the fact that the strip attaches to a larger area of land annexed by the same ordinance, regardless of whether Papillion's experts call this a single tract or not. On the maps of the annexations, these two strips stick out from the corporate boundaries like sore thumbs. Even viewed together with the other areas annexed, section F of 1526 and section B of 1527 clearly violate § 16-117. The question then becomes whether these violations invalidate the entirety of the ordinances allowing for them.

Severability

[15,16] Generally, the partial invalidity of an ordinance does not necessarily make the remaining provisions of the ordinance ineffective.[28] If a city ordinance contains valid and invalid provisions, the valid portion will be upheld if it is a complete law, capable of enforcement, and is not dependent upon that which is invalid.[29] In other words, the valid part may be carried into effect if what remains after the invalid part is eliminated contains the essential elements of a complete ordinance.[30] A

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[27] *County of Sarpy v. City of Gretna*, *supra* note 6.

[28] See *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N.W.2d 643 (1951).

[29] *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960); *Arrigo v. City of Lincoln*, *supra* note 28.

[30] *Zimmerer v. Stuart*, 88 Neb. 530, 130 N.W. 300 (1911); *In re Langston*, 55 Neb. 310, 75 N.W. 828 (1898).

severability clause is not necessary to maintain the partial validity of a law under these standards.[31]

Section 16-117(2) specifically attempts to clarify that the partial invalidity of an annexation ordinance will not invalidate the whole. It provides that "[t]he invalidity of the annexation of any tract of land in one ordinance shall not affect the validity of the remaining tracts of land which are annexed by the ordinance and which otherwise conform to state law." A "tract of land" is not specifically defined in chapter 16 or in any relevant case law.

In the case cited by Sarpy, *Wagner v. City of Omaha*,[32] a single ordinance sought to annex 490 acres of land. It is unclear how the ordinance described the 490 acres. We noted that while a large part of the area had been platted and was strictly residential or urban agricultural, there were also two unplatted tracts containing between 90 and 103 acres of agricultural lands rural in character. As such, we concluded that by including these rural lands, the city had exceeded its statutory authority. We further concluded that this error invalidated the entirety of the annexation ordinance, explaining that "'the drawing of boundary lines is a legislative act'"[33] and that as such, "we have no authority to revise the boundary line of the city, as extended by the ordinance."[34]

In the more recent case of *Swedlund v. City of Hastings*,[35] we considered whether the annexed property was adjacent to the city and whether it was rural in character. We noted that the land annexed was described by a single metes and bounds description. And we stated in dicta that if any portion of the land violated the requirements of § 16-117, then the entire ordinance would be invalid.[36]

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[31] See *Robotham v. State*, 241 Neb. 379, 488 N.W.2d 533 (1992).

[32] *Wagner v. City of Omaha*, *supra* note 13.

[33] *Id.* at 170, 55 N.W.2d at 495, quoting *State, ex rel., v. City of Largo*, 110 Fla. 21, 149 So. 420 (1933).

[34] *Id.*

[35] *Swedlund v. City of Hastings*, *supra* note 14.

[36] *Id.*

We determine that the fundamental issue is whether the offending tails in the Papillion ordinances are described in such a place and manner in the ordinances that they can be redacted, leaving intact the essential elements of a complete ordinance without the necessity of any redrawing of boundary lines. We agree with the district court that this can be done for ordinance No. 1526, but not for ordinance No. 1527. In ordinance No. 1526, the 4-mile-long Highway 370 tail is described in a separate paragraph containing its own metes and bounds description, which in no way affects the descriptions of the other areas sought to be annexed.

But in ordinance No. 1527, not only is the entirety of the property described in a single metes and bounds description, but within that description, the 84th Street corridor is set forth from the beginning point of the entire annexation area straight to the northerly right-of-way line of Capehart Road. It is not possible to simply redact the language that creates this unlawful appendage and leave a coherent metes and bounds description behind. In other words, when the invalid portion of the ordinance is removed, there are no longer the essential elements of a valid ordinance. The invalidity of the tail in ordinance No. 1527 causes the ordinance to be invalid in its entirety.

Null and Void Versus Permanent Injunction

The district court was thus correct in issuing a permanent injunction as to the entirety of ordinance No. 1527 and as to only the 4-mile Highway 370 tail described in the second paragraph of ordinance No. 1526, which is section F of the appendix A map. We find no merit to Sarpy's assignment of error that the district court failed to specifically declare these attempted annexations null and void. In fact, the district court states in its order: "[T]his Court concludes that Papillion's 'strip' or 'corridor' annexation attempts sought through Ordinances #1526 and #1527 are invalid, and therefore must be declared null and void." As to ordinance No. 1527, the court later states the entire ordinance must be "struck down." As to ordinance No. 1526, the court concluded that only the second full paragraph needed

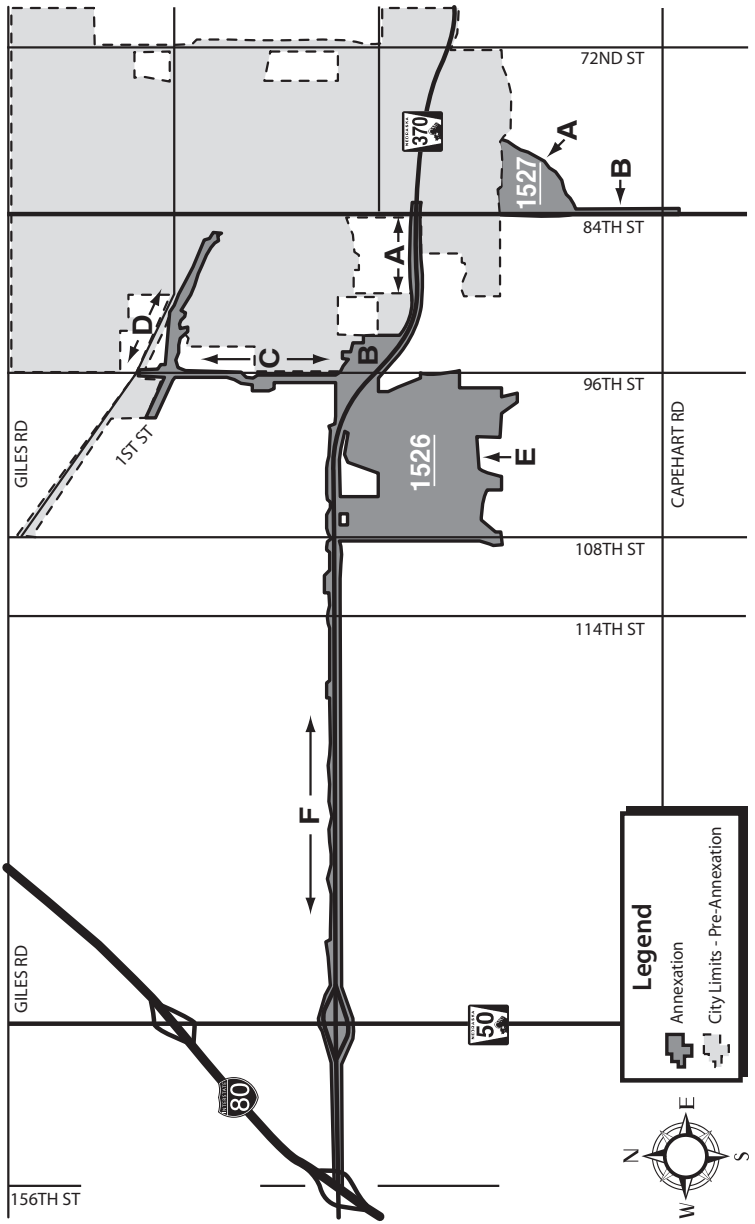
to be "struck" and that the ordinance would be "invalidated" as to that provision. We conclude it to be of no consequence that the court failed to state in its order after the sentence beginning with "It is Therefore Ordered and Adjudged" that these provisions were "null and void." The remedy for an annexation in violation of § 16-117 is a permanent injunction, and that is the remedy Sarpy received.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

(*See page 845 for appendix A.*)


72ND ST
84TH ST
96TH ST
108TH ST
114TH ST
156TH ST
GILES RD
GILES RD
1ST ST
CAPEHART RD
370
50
80
1527
1526
A
B
C
D
E
F
Legend
Annexation
City Limits - Pre-Annexation
N
E
S
W

APPENDIX A

ESTATE OF DENNIS POWELL, BY AND THROUGH DOUGLAS POWELL AND TRACY POWELL, SPECIAL ADMINISTRATORS, ET AL., APPELLEES, V. SCOTT A. MONTANGE ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS, AND SHARON KLEIN, THIRD-PARTY DEFENDANT, APPELLEE.

765 N.W.2d 496

Filed May 22, 2009. No. S-08-281.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contribution: Words and Phrases.** Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.
4. **Liability: Contribution.** Generally, a common liability must exist in order for there to be contribution. That is to say, each party must be liable to the same person.
5. **Liability: Contribution: Compromise and Settlement.** A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.
6. **Liability: Contribution.** In order to recover on a claim for contribution among joint tort-feasors, the following elements must be shown: (1) There must be a common liability among the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in settlement must be reasonable.
7. **Contribution: Equity.** The doctrine of contribution is an equitable doctrine which requires that persons under a common burden share that burden equitably.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Elizabeth M. Callaghan and Thomas A. Grennan, of Gross & Welch, P.C., L.L.O., for appellants.

Brian D. Nolan, of Nolan, Olson, Hansen, Lautenbaugh & Buckley, L.L.P., for appellee Sharon Klein.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Dennis Powell (Powell), a passenger in a vehicle driven by Scott A. Montange, died as a result of injuries sustained in a motor vehicle accident. Powell's estate sued Montange and the vehicle's owners, Jerry Sand and Liz Sand (collectively defendants). The defendants filed a third-party complaint for contribution against Sharon Klein, the driver of a second vehicle that they alleged was a cause of the accident. The defendants settled with Powell's estate and obtained a limited release which stated that Klein was not a party to the settlement.

Klein moved for summary judgment, claiming that the defendants could not seek contribution from her. The district court granted Klein's motion, and the defendants appeal.

SCOPE OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

FACTS

On August 13, 2003, Powell was a passenger in a truck driven by Montange. The truck was southbound on 12th Avenue, a county road in Cass County, Nebraska. As the truck approached the crest of a hill, Montange allegedly met a northbound vehicle driven by Klein. Montange took evasive

action to avoid a collision but lost control. The truck went into a ditch and landed on its roof. Powell was ejected from the truck and sustained injuries that resulted in his death on September 8. Powell's estate, through its special administrators, Douglas Powell and Tracy Powell (collectively the Estate), sued the defendants.

The Estate alleged that Montange was negligent in failing to keep the vehicle he was driving under control, traveling at an excessive rate of speed, failing to keep a proper lookout, and failing to drive on the right side of the road and that Montange's negligence was imputed to the Sands. The Estate filed no action against Klein.

The defendants filed a third-party complaint against Klein. They alleged that the accident was caused by Klein's negligence in crossing the centerline on the road, failing to stop or swerve to avoid the near impact with the vehicle driven by Montange, and failing to slow down and pull over once she realized that the Montange vehicle was approaching from the opposite direction. The defendants asserted that they were entitled to contribution from Klein.

As a result of their settlement with the Estate, the defendants sought contribution from Klein for all sums which exceeded any proportionate share of their negligence and asked that the trier of fact apportion Klein's negligence. Klein answered, alleging that the defendants had entered into a limited release with the Estate which covered only the parties identified in the release and that the release could not serve as a basis for contribution against Klein.

The release, which was signed by the Estate in Douglas Powell's and Tracy Powell's capacities as individuals and as special administrators, stated:

> Nothing in this **Release** is to be construed as a release of . . . Klein, either by [the Estate] or [Montange, the Sands, and the Sands' insurer]. [The Estate] specifically understands and acknowledges that . . . Montange [and the Sands] have an outstanding claim against . . . Klein and nothing in this **Release** is to be construed as a discharge or waiver of the claims of . . . Montange [and the Sands] against . . . Klein. Furthermore, [the Sands]

> and [their] counsel agree to cooperate with [Montange, the Sands, and the Sands' insurer] as to the third-party action which will remain on file in the Cass County District Court.

The settlement payment was $400,000, with a reimbursement claim to the State of Nebraska in the amount of $70,405.86.

The district court sustained Klein's motion for summary judgment and dismissed the defendants' action for contribution. The court identified the following material facts which were undisputed: Powell was a passenger in a vehicle driven by Montange on August 13, 2003, and died as a result of the accident; the Estate and the defendants entered into a limited release; and Klein was not a released party in the limited release.

The district court determined that the defendants were barred from seeking contribution from Klein because she was not a party to the settlement between the Estate and the defendants and had not been released from liability to the Estate. The court concluded that Klein received no benefit from the settlement and remained exposed to a lawsuit. It found that there were no material issues of fact with regard to the defendants' claim against Klein on the basis of contribution and that Klein was entitled to judgment as a matter of law.

ASSIGNMENTS OF ERROR

The defendants assign as error the district court's grant of summary judgment and its finding that the defendants could not seek contribution from Klein.

ANALYSIS

[3,4] The issue is whether the defendants can maintain an action for contribution against Klein. "Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification." *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 807, 733 N.W.2d 877, 885 (2007).

> The prerequisites to a claim for contribution are that the party seeking contribution and the party from whom it is sought share a common liability and that the party seeking contribution has discharged more than his fair

> share of the common liability. 18 C.J.S. *Contribution* § 5 (1990). . . . In other words, a common liability to the same person must exist in order for there to be contribution.

Smith v. Kellerman, 4 Neb. App. 178, 185-86, 541 N.W.2d 59, 65 (1995). "[G]enerally, a common liability must exist in order for there to be contribution. That is to say, each party must be liable to the same person." *Teegerstrom v. H. J. Jeffries Truck Line*, 216 Neb. 917, 921, 346 N.W.2d 411, 414 (1984).

Other than the above pronouncements, this court has said very little regarding contribution among joint tort-feasors. We have held that there is no absolute bar to contribution among joint tort-feasors. See *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975) (*Royal Indemnity*). "[A] right to equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he discharges more than his proportionate share of the judgment." *Id.* at 764, 229 N.W.2d at 190.

In *Reese v. AMF-Whitely*, 420 F. Supp. 985 (D. Neb. 1976), the federal court discussed the law of contribution in Nebraska. The court stated:

> The statement [from *Royal Indemnity*] that "there is no absolute bar to contribution among negligent joint tort-feasors" would seem to encompass both those against whom a plaintiff has successfully obtained a judgment and those whose liability remains to be fixed either in a cross claim or third-party claim in the original plaintiff's suit or in an independent action for contribution by the original defendant.

Reese, 420 F. Supp. at 987.

In *Rawson v. City of Omaha*, 212 Neb. 159, 163, 322 N.W.2d 381, 384 (1982), we stated, "[G]enerally, in order for a party to recover contribution after a settlement of a claim by one of the parties, there must be a common liability proved to exist between both the party settling the claim and the party from whom contribution is being sought."

In *Northland Ins. Co. v. State*, 242 Neb. 10, 492 N.W.2d 866 (1992), we affirmed the *Reese* court's interpretation of

Nebraska law that the right of contribution would encompass both those against whom a plaintiff has successfully obtained a judgment and those whose liability remains to be fixed.

Although this court has recognized a right of contribution among joint tort-feasors who share a common liability, we have not specifically addressed whether a tort-feasor who enters into a settlement with the claimant can recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement.

Nebraska has no legislation governing contribution among joint tort-feasors. A number of states have adopted a form of legislation regulating contribution. Some states have adopted the Uniform Contribution Among Tortfeasors Act (UCATA) or a variation of it. The UCATA provides, in part, that "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." UCATA § 1(a), 12 U.L.A. 201 (2008). See, e.g., Ariz. Rev. Stat. Ann. §§ 12-2501 to 12-2509 (2003); Ark. Code Ann. § 16-61-202 (2005); Colo. Rev. Stat. Ann. §§ 13-50.5-101 to 13-50.5-106 (West 2005); Del. Code Ann. tit. 10, § 6302 (1999); Fla. Stat. Ann. § 768.31 (West 2005); Haw. Rev. Stat. §§ 663-11 to 663-17 (1993 & Cum. Supp. 2008); Mass. Gen. Laws Ann. ch. 231B, §§ 1 to 4 (West 2000); Mich. Comp. Laws Ann. § 600.2925a (West 2000); Nev. Rev. Stat. § 17.225 (2007); N.H. Rev. Stat. Ann. § 507:7-f (1997); N.M. Stat. Ann. § 41-3-2 (LexisNexis 1996); N.C. Gen. Stat. § 1B-1 (2007); N.D. Cent. Code § 32-38-01 (1996); Ohio Rev. Code Ann. § 2307.25 (LexisNexis 2002); Okla. Stat. Ann. tit. 12, § 832 (West 2000); Or. Rev. Stat. § 31.800 (2007); 42 Pa. Stat. Ann. §§ 8321 to 8327 (West 2007); R.I. Gen. Laws § 10-6-5 (1997); S.C. Code Ann. § 15-38-20 (1977); S.D. Codified Laws § 15-8-12 (2004); Tenn. Code Ann. § 29-11-101 et seq. (2000); Va. Code Ann. § 8.01-35.1 (2007). This legislation corresponds with our recognition of a right of contribution as set forth above.

However, the UCATA also places limits on the right of contribution. Only a tort-feasor who has paid more than his or

her pro rata share of the common liability may seek contribution, and recovery is limited to the amount paid in excess of his or her pro rata share. No tort-feasor is compelled to make contribution beyond his or her own pro rata share of the entire liability. UCATA § 1(b), 12 U.L.A. 201. This also corresponds with our requirement set forth in *Royal Indemnity*.

[5] The right of contribution is not available in all instances or circumstances. The UCATA places restrictions on contribution if a settlement has been entered into.

> A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

UCATA § 1(d), 12 U.L.A. at 202.

In *Schuman v. Vitale*, 144 Pa. Commw. 560, 564, 602 A.2d 390, 392 (1992), the court determined that the state's UCATA meant that

> where there are two or more joint tort-feasors and one of them settles with the injured person, such settling joint tort-feasor may not recover contribution from the other non-settling joint tort-feasors unless the settlement by the settling joint tort-feasor extinguishes the liability of the non-settling joint tort-feasor to the injured person.

See, also, *King v. Humphrey*, 88 N.C. App. 143, 362 S.E.2d 614 (1987).

Other states have adopted the Uniform Comparative Fault Act (UCFA), which also places limits on the right of contribution. It allows, in part, a right of contribution among joint tort-feasors who are jointly and severally liable whether or not judgment has been entered against any or all of them. UCFA § 4(a), 12 U.L.A. 142 (2008). Under the UCFA, contribution is "available to a person who enters into a settlement with a claimant only (1) if the liability of the person against whom contribution is sought has been extinguished and (2) to the extent that the amount paid in settlement was reasonable." UCFA § 4(b), 12 U.L.A. at 142. See, e.g., Iowa Code Ann. § 668.5 (West 1998); Wash. Rev. Code Ann. § 4.22.040 (West 2005).

Iowa has adopted comparative fault legislation that includes a substantial adaptation of the UCFA. See *Aid Ins. Co. v. Davis County*, 426 N.W.2d 631 (Iowa 1988). The relevant Iowa statute permits contribution when there is a settlement if the liability of the second tort-feasor has been extinguished and only to the extent that the amount paid in settlement was reasonable. *Id.* If judgment has not been rendered, the statute allows contribution only if the person bringing the action for contribution has "'discharged the liability of the person from whom contribution is sought by payment made within the period of the statute of limitations applicable to the claimant's right of action . . . .'" *Id.* at 632, quoting Iowa Code Ann. § 668.6(3)(a) (West 1998).

Because Nebraska has no legislative parameters governing contribution, we proceed in the general direction of decisions by this court which have stated (1) that there is no absolute bar to contribution, (2) that contribution is available both when a plaintiff has obtained a judgment against the tort-feasors and when the plaintiff has not obtained a judgment and the liability of joint tort-feasors has yet to be determined, (3) that there must be a common liability between the party seeking contribution and the party from whom contribution is sought, and (4) that the party seeking contribution must have discharged more than his or her share of the common liability.

The question is whether this court should impose additional limitations on the right of contribution that are expressed in the UCATA or similar legislation adopted by other states. One limitation provides that the settling joint tort-feasor may not recover contribution from the other nonsettling joint tort-feasors unless the settlement extinguishes the liability of the nonsettling joint tort-feasors to the injured party. See *Schuman v. Vitale*, 144 Pa. Commw. 560, 602 A.2d 390 (1992).

We find the case of *Ogle v. Craig Taylor Equipment Co.*, 761 P.2d 722 (Alaska 1988), helpful to our resolution of this question. The Supreme Court of Alaska set forth six elements of a claim for contribution: (1) The claimant must be a tort-feasor; (2) the contribution defendant must be a tort-feasor; (3) the tort-feasors must be jointly and severally liable in tort for the same injury; (4) the claimant must have paid more than its pro

rata share of the common liability; (5) the claimant must have extinguished the contribution defendant's liability for the injury or wrongful death; and (6) if the liability was extinguished by settlement, the amount must be reasonable. These elements parallel the direction Nebraska has taken regarding contribution and contain the limitations described in the UCATA and the UCFA.

Other courts have also held that the liability against the third-party defendant must have been extinguished in order to permit contribution from the joint tort-feasor. A settling tort-feasor can pursue contribution against a nonsettling tort-feasor only if the settlement extinguished the liability of the nonsettling tort-feasor. *Nuessmeier Elec., Inc. v. Weiss Mfg. Co.*, 632 N.W.2d 248 (Minn. App. 2001). "[T]he settling tortfeasor must have removed the threat that the injured party might later proceed directly against the non-settling tortfeasor." *Id.* at 253.

The Florida Supreme Court, in discussing provisions of the UCATA that have been adopted in Florida, stated:

> A tortfeasor who settles without extinguishing the entire liability, and whose payment later turns out to be less than his fair share, is not subject to actions for contribution to others. . . . A tortfeasor who settles without extinguishing the liability of another tortfeasor, and whose payment later turns out to be more than his fair share, has no right of contribution against the other. . . . In buying his peace, such a settling tortfeasor merely misjudged the value of the claim.

Woods v. Withrow, 413 So. 2d 1179, 1183 (Fla. 1982). Thus, other courts have recognized the requirement that the settling tort-feasor must have extinguished the liability of the nonsettling tort-feasor as a basis to seeking contribution from the nonsettling tort-feasor.

The defendants urge this court to adopt the reasoning of *Clark's Resources, Inc. v. Ireland*, 142 S.W.3d 769 (Mo. App. 2004), which we decline to do. In that case, Daniel Buckley died from injuries he sustained during an altercation at a bar owned by Clark's Resources, Inc. (Clark's). Sean Ireland was allegedly involved in the altercation. Buckley's parents and

Clark's entered into a settlement agreement that did not include Ireland. Clark's then filed an action against Ireland seeking contribution. The trial court entered judgment for Ireland, concluding that Clark's was barred from seeking contribution because Ireland's liability to Buckley's parents had not been discharged in the settlement.

In reversing the judgment of the trial court, the appellate court reasoned that it need not resolve whether the settlement had extinguished Ireland's liability, because his liability could also be discharged by expiration of the statute of limitations on Buckley's parents' claims against him. The appellate court concluded that "when the statute of limitations has expired on the claims against a non-settling tortfeasor, his liability has been extinguished for purposes of a settling tortfeasor's right to seek contribution from him." *Id.* at 771. The appellate court reversed the judgment and remanded the cause for further proceedings. Similarly, the defendants in the case at bar claim they should be able to seek contribution from Klein because her liability has been extinguished by applicable statutes of limitation.

We choose not to follow the court's decision in *Clark's Resources, Inc*. Whether Klein's liability to the Estate has extinguished by applicable statutes of limitation was not an issue presented to the district court. Since the issue was not presented to the lower court, we do not consider whether applicable statutes of limitation extinguished Klein's liability. See *Clark v. Clark*, 275 Neb. 276, 746 N.W.2d 132 (2008) (appellate court will not consider issue on appeal that was not passed upon by trial court). Even assuming that Klein's liability was barred by applicable statutes of limitation and her liability was extinguished, it was not because of the settlement by the defendants. The defendants' settlement was of no benefit to Klein. Thus, the defendants did not establish they extinguished Klein's liability for the injury or wrongful death. See *Schuman v. Vitale*, 144 Pa. Commw. 560, 602 A.2d 390 (1992).

[6] We now hold that in order to recover on a claim for contribution among joint tort-feasors, the following elements must be shown: (1) There must be a common liability among

the party seeking contribution and the parties from whom contribution is sought; (2) the party seeking contribution must have paid more than its pro rata share of the common liability; (3) the party seeking contribution must have extinguished the liability of the parties from whom contribution is sought; and (4) if such liability was extinguished by settlement, the amount paid in settlement must be reasonable.

In the case at bar, the defendants and Klein are alleged to be tort-feasors jointly and severally liable for the wrongful death. Whether the parties seeking contribution paid more than their pro rata share is not known, but it is not necessary to our analysis, because Klein's liability was not extinguished by the settlement. The common liability among the joint tort-feasors must be extinguished by the tort-feasor seeking contribution.

[7] The basis for an action for contribution is the discharge of a common liability caused by joint tort-feasors in which one tort-feasor has paid more than his or her proportionate share. See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). Under equitable principles, the discharge of such liability is a benefit to the tort-feasor from whom contribution is sought. However, without such discharge, the other tort-feasor may remain liable to the injured party and the tort-feasor seeking contribution will not have fixed the amount of liability for which contribution is sought. A settlement by one tort-feasor that does not extinguish the common liability does not confer a benefit upon which a claim for contribution may be asserted. "'The doctrine of contribution is an equitable doctrine which requires that persons under a common burden share that burden equitably.'" *Zaffke v. Wallestad*, 642 N.W.2d 757, 759 (Minn. App. 2002). If the common burden is to be shared, the discharge of liability from such burden must also be shared. Thus, a right of contribution among joint tort-feasors is not established if the tort-feasor seeking contribution extinguishes only his or her liability and does not extinguish the liability of the other joint tort-feasors from whom contribution is sought.

The reciprocal also applies. A joint tort-feasor who settles without extinguishing the entire liability, and whose payment

later turns out to be less than his fair share, is not subject to actions for contribution to others. See *Woods v. Withrow*, 413 So. 2d 1179 (Fla. 1982).

Here, the defendants entered into a settlement with the Estate prior to the entry of judgment against any of the tort-feasors. The defendants took no action to extinguish Klein's liability prior to entering into such settlement. The settlement did not extinguish Klein's liability, because she was not a party to it. The defendants have not met the requirement that the party seeking contribution must have extinguished the liability of the joint tort-feasor from whom contribution is sought. Klein's liability was not extinguished, and she remained exposed to a lawsuit.

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and the court gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

CONCLUSION

The record presented in this case shows that there is no genuine issue as to any material fact. The undisputed facts show that Powell, a passenger in a vehicle driven by Montange, died as a result of a motor vehicle accident. The Estate sued the defendants for negligence. Klein was not made a party to that action. The defendants and the Estate entered into a settlement that specifically stated Klein was not a released party.

Applying the elements required for contribution to the case at bar, we determine that the defendants did not demonstrate that they extinguished Klein's liability by the settlement. The district court correctly determined that the defendants were barred from seeking contribution from Klein because they did

not obtain a settlement or common release which extinguished Klein's liability.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DOUGLAS E. DRAGOO, APPELLANT.
765 N.W.2d 666

Filed May 29, 2009. No. S-08-113.

1. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Constitutional Law: Double Jeopardy.** The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.
5. **Double Jeopardy: Statutes: Sentences: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution. If so, they are not the same offense and double jeopardy is not a bar to additional punishment or successive prosecution.
6. **Lesser-Included Offenses: Sentences.** *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), requires a comparative analysis of statutory elements, not penalties. The felony classification of the offenses in question has no bearing on the issue of whether one is a lesser-included offense of the other, or whether the Legislature has specifically authorized cumulative punishment for the two offenses.
7. **Lesser-Included Offenses: Convictions.** When a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated.

Petition for further review from the Court of Appeals, IRWIN, SIEVERS, and CARLSON, Judges, on appeal thereto from the

District Court for Antelope County, PATRICK G. ROGERS, Judge. Judgment of Court of Appeals affirmed.

Patrick P. Carney and Jonathan R. Brandt, of Carney Law, P.C., for appellant.

Jon Bruning, Attorney General, Erin E. Leuenberger, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Douglas E. Dragoo was convicted of one count of driving under the influence (DUI); the conviction was enhanced because Dragoo's blood alcohol content was .15 of 1 gram per 100 milliliters of his blood and he had three prior DUI convictions.[1] Dragoo was also convicted of one count of DUI causing serious bodily injury.[2] Both charges arose from the same motor vehicle accident in which two persons sustained serious injuries. On appeal, Dragoo contended that the separate consecutive sentences he received for each conviction constituted double punishment for the same offense, in violation of the Double Jeopardy Clause.[3] Applying the test articulated in *Blockburger v. United States*,[4] the Nebraska Court of Appeals agreed and dismissed the conviction and sentence for DUI, leaving the conviction and sentence for DUI causing serious bodily injury intact.[5] We granted the State's petition for further review to consider its argument that under *Missouri v. Hunter*,[6] the *Blockburger* test is inapplicable where the Legislature has

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[1] See Neb. Rev. Stat. §§ 60-6,196 (Reissue 2004) and 60-6,197.03(8) (Cum. Supp. 2006).

[2] See Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2006).

[3] *State v. Dragoo*, 17 Neb. App. 267, 758 N.W.2d 60 (2008).

[4] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[5] *State v. Dragoo*, *supra* note 3.

[6] *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

expressed a clear intent to impose multiple punishments for the same conduct. We conclude that there is no such expression of legislative intent with respect to the offenses for which Dragoo was convicted, and we therefore affirm the judgment of the Court of Appeals.

BACKGROUND

The facts and procedural history of this case are set forth fully in the published opinion of the Court of Appeals, and we summarize them here only to the extent necessary for our analysis. On December 15, 2006, a vehicle operated by Dragoo collided with another vehicle at a rural intersection in Antelope County, Nebraska. The driver of the other vehicle and her passenger sustained serious injuries in the accident. When a deputy sheriff questioned him at the hospital after the accident, Dragoo admitted that he had been drinking. Testing disclosed that Dragoo had a blood alcohol concentration of .222 of 1 gram of alcohol per 100 milliliters of blood on the night of the accident.

Dragoo was originally charged in the district court for Antelope County with fourth-offense DUI, a Class IIIA felony. He was subsequently charged in an amended information with two separate counts: fourth-offense DUI (with a blood alcohol concentration of .15 or more), a Class III felony, and DUI causing serious bodily injury, a Class IIIA felony. Dragoo entered pleas of not guilty and was tried by a jury. The jury found him guilty of DUI with a blood alcohol concentration which equaled or exceeded .15 of 1 gram per 100 milliliters of blood, and DUI causing serious bodily injury. The court conducted an enhancement hearing and determined that Dragoo had three valid prior DUI convictions and was therefore guilty of fourth-offense DUI, a Class III felony according to § 60-6,197.03. The court sentenced Dragoo to 24 to 36 months' incarceration for that offense, with credit for time served. The court also imposed a consecutive sentence of 12 to 18 months' incarceration for the conviction for DUI causing serious bodily injury. In addition, the court ordered Dragoo to pay costs and revoked his driver's license for a period of 15 years.

In addressing Dragoo's double jeopardy claim under the *Blockburger* test, the Court of Appeals compared the elements of DUI as defined by § 60-6,196 with the elements of DUI causing serious bodily injury as defined by § 60-6,198. The court first noted the facts that this was Dragoo's fourth DUI conviction and his blood alcohol concentration was .15 of 1 gram or more by weight of alcohol per 100 milliliters of blood were "sentencing enhancement provisions under § 60-6,197.03, and not elements of the offense [of DUI]."[7] Comparing only the statutory elements of the two offenses, the Court of Appeals reasoned that because DUI causing serious bodily injury included all of the elements of DUI plus the additional element of a resulting bodily injury, DUI was a lesser-included offense of DUI causing serious bodily injury. The court concluded that Dragoo's consecutive sentences on the two counts were thus "cumulative sentences for the same offense and constitute separate and multiple punishments for the same offense, a denial of the protection against double jeopardy, afforded by both the state and federal Constitutions."[8] The court therefore reversed the DUI conviction and remanded the cause with directions to dismiss.

The Court of Appeals found no merit in Dragoo's other assignments of error, and he has not petitioned for further review. The State filed a petition for further review, which was granted.

ASSIGNMENTS OF ERROR

The State assigns, restated, that the Court of Appeals erred by (1) ordering the dismissal of Dragoo's conviction and greater sentence for the higher class felony of fourth-offense DUI, aggravated, on the ground that the sentence was a cumulative sentence in violation of the Double Jeopardy Clause and (2) concluding that the Double Jeopardy Clause was violated by sentencing Dragoo for the Class III felony of fourth-offense DUI, aggravated, and for the Class IIIA felony of DUI causing serious bodily injury.

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[7] *State v. Dragoo*, *supra* note 3, 17 Neb. App. at 274, 758 N.W.2d at 67.

[8] *Id.* at 275, 758 N.W.2d at 67.

STANDARD OF REVIEW

[1] Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law.[9]

[2] Statutory interpretation presents a question of law.[10] When reviewing questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[11]

ANALYSIS

[3,4] The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[12] The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.[13]

[5] Under the *Blockburger*[14] or "same elements" test applied by the Court of Appeals, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[15] If not, they are the same offense and double jeopardy bars additional punishment and successive prosecution.[16] If so, they are not the same offense and double

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[9] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[10] See, *State v. Moore*, *ante* p. 111, 759 N.W.2d 698 (2009); *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009).

[11] See *id.*

[12] *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds*, *State v. Rogers*, *ante* p. 37, 760 N.W.2d 35 (2009).

[13] *State v. Jackson*, 274 Neb. 724, 742 N.W.2d 751 (2007); *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[14] *Blockburger v. United States*, *supra* note 4.

[15] *Id.*, 284 U.S. at 304. See, *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

[16] See *State v. Winkler*, *supra* note 15.

jeopardy is not a bar to additional punishment or successive prosecution.[17]

In Nebraska, DUI and DUI causing serious bodily injury are separately codified offenses. DUI as defined by § 60-6,196 requires proof that the defendant was operating or in the actual physical control of a motor vehicle (1) while under the influence of alcoholic liquor or (2) when having a concentration of .08 of 1 gram or more by weight of alcohol per 100 milliliters of his or her blood. DUI causing serious bodily injury as defined by § 60-6,198 requires proof that (1) the defendant was operating a motor vehicle, (2) the defendant was operating a motor vehicle in violation of § 60-6,196, and (3) the defendant's act of DUI proximately caused serious bodily injury to another person. Based on these statutory definitions, it is clear that the offense of DUI causing serious bodily injury includes an element not included in the offense of DUI, namely, the causation of serious bodily injury. But the offense of DUI does not include any element which is not included in the offense of DUI causing serious bodily injury. The Court of Appeals correctly applied the *Blockburger* test and concluded that DUI is a lesser-included offense of DUI causing serious bodily injury and that thus, Dragoo's convictions violated the Double Jeopardy Clause's prohibition against multiple punishments for the same offense.

The State does not quarrel with the Court of Appeals' *Blockburger* analysis. It argues, however, that *Blockburger* is inapplicable here under the reasoning of *Missouri v. Hunter*.[18] In that case, the U.S. Supreme Court held that *Blockburger* is a rule of statutory construction, not a constitutional rule, and that it does not preclude the imposition of cumulative punishments in a single trial where such imposition is specifically authorized by the legislative body. The defendant in that case was convicted under two Missouri statutes, one defining the offense of robbery and the other defining the offense of armed criminal action. The latter statute included the following provision: "'The punishment imposed pursuant to this subsection shall be

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[17] *Id.*

[18] *Missouri v. Hunter, supra* note 6.

in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon.'"[19] Noting that by including this provision, the Missouri Legislature had "made its intent crystal clear," the Court concluded:

> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.[20]

We recently applied this reasoning in *State v. Mata*.[21] In that postconviction case, the defendant contended that his counsel was ineffective for failing to argue that he was subjected to double jeopardy because he was sentenced for both making terroristic threats and for using a firearm to make such threats. Finding no merit in this argument, we stated the established principle that when the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the court imposes the cumulative punishments in a single proceeding.[22] We found the requisite legislative intent to impose cumulative punishment in the language of the statute establishing the crime of using a deadly weapon to commit a felony, which provided that the offense "'shall be treated as [a] separate and distinct offense . . . from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed.'"[23]

[6,7] We find no comparable expression of legislative intent in § 60-6,196, defining the offense of DUI; in § 60-6,198,

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[19] *Id.*, 459 U.S. at 362 (quoting Missouri's armed criminal action statute then in effect).

[20] *Id.*, 459 U.S. at 368-69.

[21] *State v. Mata*, 273 Neb. 474, 730 N.W.2d 396 (2007).

[22] *Id.*

[23] *State v. Mata*, *supra* note 21, 273 Neb. at 481, 730 N.W.2d at 401, quoting Neb. Rev. Stat. § 28-1205(3) (Reissue 1995). See, also, *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

defining the offense of DUI causing serious bodily injury; or in § 60-6,197.03, articulating the penalties for violation of § 60-6,196. The State argues that the requisite legislative intent exists because the Legislature designated fourth-offense DUI as a Class III felony carrying a greater penalty than DUI causing serious bodily injury, a Class IIIA felony. This argument fails for two reasons. First, as the Court of Appeals correctly reasoned, Dragoo was convicted of DUI; his prior offenses and higher blood alcohol concentration were sentencing enhancement provisions, not elements of the offense.[24] Second, this court has rejected the notion that felony classifications have any bearing on determination of lesser-included offenses. In *State v. Gresham*,[25] we wrote that "[u]nder the statutory elements test adopted by this court, the relative penalties are not a factor in identifying lesser-included offenses" and concluded that "the fact that two offenses are of the same class and carry the same range of penalties does not affect the determination of whether one is a lesser-included offense of the other." The same reasoning applies here. *Blockburger* requires a comparative analysis of statutory elements, not penalties. The felony classification of the offenses in question has no bearing on the issue of whether one is a lesser-included offense of the other, or whether the Legislature has specifically authorized cumulative punishment for the two offenses.[26] DUI causing serious bodily injury is the "greater" offense here, notwithstanding its lower classification and penalty, because it includes all of the elements of DUI plus an additional element. When a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated.[27] Because the Legislature has not clearly authorized cumulative

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[24] See, *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000), *overruled on other grounds, State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006), *as recognized in State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008); § 60-6,197.03(8).

[25] *State v. Gresham*, 276 Neb. 187, 194, 752 N.W.2d 571, 577 (2008).

[26] See, *Missouri v. Hunter*, *supra* note 6; *State v. Gresham*, *supra* note 25.

[27] *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997); *State v. Sardeson*, 231 Neb. 586, 437 N.W.2d 473 (1989).

punishment for the two offenses, the lesser DUI offense must be dismissed.

Finally, we address the State's argument that the decision of the Court of Appeals which we affirm today somehow permits Dragoo to "escape" the enhanced penalties the Legislature prescribed for fourth-offense DUI with an elevated blood alcohol concentration.[28] Had Dragoo been charged only with DUI, as he was originally, upon conviction, he would have been subject to the enhanced penalties resulting from his prior DUI convictions and his elevated blood alcohol concentration. The double jeopardy issue which has resulted in his receiving a lesser sentence in this case was the direct consequence of the prosecutor's tactical decision to add the charge of DUI causing serious bodily injury in the amended information. Dragoo has not "escaped" the enhanced penalty he should have received; he was relieved of it by the State's charging decision, which we cannot undo.

CONCLUSION

For the reasons discussed, we affirm the judgment of the Nebraska Court of Appeals.

AFFIRMED.

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[28] Brief for appellee in support of petition for further review at 9.

LOUIS OBAD, APPELLANT, V.
STATE OF NEBRASKA, APPELLEE.
766 N.W.2d 89

Filed May 29, 2009. No. S-08-703.

1. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
2. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
3. **Search and Seizure: Property.** Neb. Rev. Stat. § 28-431(4) (Reissue 2008) sets forth two avenues by which a purported owner or claimant may prevent forfeiture and recover his or her property. First, under § 28-431(4), the forfeiture statute allows the owner of record of such property, at any time after seizure and prior to

court disposition, to petition the district court of the county in which seizure was made to release such property. Second, § 28-431(4) provides that any person having an interest in the property proceeded against or any person against whom civil or criminal liability would exist if such property is in violation of the Uniform Controlled Substances Act may, within 30 days after seizure, appear and file an answer or demurrer to the petition.

4. ____: ____. The alleged owner of cash cannot be an owner of record under Neb. Rev. Stat. § 28-431(4) (Reissue 2008).
5. ____: ____. A federal agency's adoption of a seizure has the same effect as if the federal agency had originally seized the property on the date it was seized by the local authorities.
6. **Search and Seizure: Property: Jurisdiction.** Where no state forfeiture proceedings are initiated, once seized property is delivered to the Drug Enforcement Agency and a federal forfeiture proceeding is instituted, state jurisdiction ends.
7. **Search and Seizure: Property.** Denial of return of property is proper where the property is subject to forfeiture.

Appeal from the District Court for Cheyenne County: KRISTINE R. CECAVA, Judge. Affirmed.

Donald J.B. Miller, of Matzke, Mattoon & Miller, L.L.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

Appellant, Louis Obad, was stopped by a Nebraska State Patrol trooper, and during the stop, the trooper seized currency and other property from Obad's vehicle. Obad filed an "Application for Return of Property" in the district court for Cheyenne County. On March 5, 2008, the district court ordered that the State return the property to Obad, but later, on May 20, the court vacated its initial order after the record at a full hearing established that the currency had been transferred to the federal government prior to the March 5 order and that forfeiture proceedings in federal court had thereafter been commenced. Obad appeals. We conclude that the district court did not abuse its discretion when it vacated its initial order

and ultimately denied the "Application for Return of Property." We affirm.

STATEMENT OF FACTS

Obad was driving an automobile on Interstate 80 in Cheyenne County, Nebraska, on January 19, 2008, when he was stopped for speeding by Trooper Aaron Watson. Obad declined Watson's request to search his vehicle. Obad was detained approximately 30 minutes while the trooper requested the assistance of another trooper with a drug detection dog.

During this time, Obad told Watson that he was traveling to Las Vegas, Nevada, to gamble. Watson asked if Obad had any cash, and Obad stated that he had $40,000 in cash for gambling. After having the drug detection dog assess the vehicle, the troopers entered the vehicle and seized U.S. currency totaling $43,584, along with other personal property. A marijuana cigarette was also found in the vehicle. Obad was not arrested at the time of the stop. The Cheyenne County Attorney filed criminal charges against Obad, but the charges were later dropped. After seizing the money, Watson took it to a bank in Scottsbluff, Nebraska. As discussed below, a check was subsequently made out to the U.S. Marshals Service.

On January 24, 2008, Obad filed a pleading entitled "Application for Return of Property" in the district court for Cheyenne County, alleging that the money seized was not contraband, evidence, or used in the commission of a crime and that it should be returned to Obad. Obad did not state the statutory basis for the request in his pleading.

On January 29, 2008, the Nebraska State Patrol sent a certified check for $43,584 to the U.S. Marshals Service because the U.S. Attorney's office agreed to seek forfeiture of the money under federal law. The district court held a hearing on Obad's application for return of property on February 4. At the hearing, Watson testified that he believed the money had already been transferred to the federal Drug Enforcement Agency and that he believed that agency would go forward with a forfeiture action.

On March 5, 2008, the district court entered an order directing the State to return the seized currency and property to

Obad. In its order, the court found that the State had not filed a forfeiture action within the 10 days allowed by Neb. Rev. Stat. § 28-431 (Reissue 2008) and that the cash was not needed as evidence in any criminal proceeding. The district court further found that Obad had shown that he had no knowledge of any violation of the Uniform Controlled Substances Act and that he had no knowledge that the currency was used in a transaction violating that act. The district court determined that Obad was entitled to the return of the currency and property.

On April 1, 2008, the State filed a motion to vacate the March 5 order. The State noted that the currency had been transferred to the federal government prior to the court's March 5 order directing the State to return the currency to Obad. The State further asserted that because the federal government had commenced a forfeiture action of the seized money on March 19, the district court did not have jurisdiction over the money. The district court held a hearing on the matter and, on May 20, entered an order vacating its March 5 order, thus ultimately denying the relief sought in Obad's application for return of property. Obad appeals.

ASSIGNMENTS OF ERROR

Obad contends that the district court erred by (1) vacating its order of March 5, 2008, thus denying Obad the return of his property under the State's forfeiture statute, and (2) failing to find that because the Nebraska state courts had initially exercised jurisdiction over the matter, the federal forfeiture action should not be permitted to circumvent procedures under state law.

STANDARD OF REVIEW

[1] We review a ruling on a motion to vacate for abuse of discretion. *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007).

ANALYSIS

Obad contends that the district court erred when it vacated its prior order which had directed the State to return Obad's property. Obad claims that he was entitled to the property under the Nebraska forfeiture statute. Obad further reasons that

because the State first exercised jurisdiction over the currency, the federal courts could not properly obtain jurisdiction over the currency, and that requiring him to litigate this matter in federal court creates wasteful litigation. Appellee, the State, responds by arguing that the district court properly vacated its initial order because Obad did not use the proper statutory procedure for requesting the return of his money. The State further argues that at the time of the hearing on the application for return of property, the money was already in the jurisdiction of the federal court, and that therefore, by virtue of "adoptive seizure," the district court could not order the money returned. The State also notes that the State did not bring a forfeiture action, but that the federal government had commenced forfeiture proceedings prior to the court's consideration of the State's motion to vacate.

[2] As an initial matter, we note that Obad's application for return of property, and the district court's March 5, 2008, order directing the State to return Obad's property, related to both the cash seized and other property seized from Obad's vehicle, including primarily a digital camera and a cellular telephone. However, in the instant appeal, Obad's arguments that the district court abused its discretion in vacating its order are limited to the validity of the Nebraska State Patrol's transfer of the money to the federal government. Obad does not address how the district court erred in vacating its order as it related to the other property. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008). Therefore, this opinion will address Obad's assigned and argued error, which is limited to the claim that the district court erred by vacating its initial order directing the State to return the seized currency.

Obad's first assigned error implicates the State's forfeiture statute. In an effort to recover his currency, Obad filed a pleading titled "Application for Return of Property." The pleading itself did not indicate on what statutory basis Obad was requesting the return of his currency. However, in his brief to this court, Obad states that he filed the application for return

of property pursuant to the State's forfeiture statute, § 28-431. Further, in the district court's initial March 5, 2008, order, that was later vacated, the court based its reasoning and determination that the currency should be returned to Obad on the State's purported failure to comply with the requirements of the State's forfeiture statute.

[3] Given the posture of this case, we must examine what authority is afforded a claimant seeking to recover his or her property under the forfeiture statute. Section 28-431(4) sets forth two avenues by which a purported owner or claimant may prevent forfeiture and recover his or her property. First, under § 28-431(4), the forfeiture statute allows the owner of record of such property, at any time after seizure and prior to court disposition, to petition the district court of the county in which seizure was made to release such property. Second, § 28-431(4) provides that "[a]ny person having an interest in the property proceeded against or any person against whom civil or criminal liability would exist if such property is in violation of the [Uniform Controlled Substances Act] may, within thirty days after seizure, appear and file an answer or demurrer to the petition."

[4] With respect to Obad's recovering the currency through the first avenue, § 28-431(4) states that this method can be used at "any time after seizure and prior to court disposition" by the "owner of record." This appeal is limited to the seized cash. We have held that the alleged owner of cash cannot be an "owner of record." See *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998). See, also, *State v. $3,067.65 in U.S. Currency*, 4 Neb. App. 443, 545 N.W.2d 129 (1996). Therefore, because Obad is not an "owner of record," he cannot successfully seek recovery of the seized currency under this statutory authority.

With respect to Obad's recovering the currency through the second avenue, the State forfeiture statute clearly anticipates the filing of forfeiture proceedings by the State before the claimant may seek recovery of property. The relevant language of the statute states that "[a]ny person having an interest in the property . . . may, within thirty days after seizure, appear and file an *answer or demurrer to the petition*." § 28-431(4)

(emphasis supplied). Given the plain language of the statute, we understand "petition" to refer to a petition to forfeit filed by the State and an "answer or demurrer" to be a pleading filed in response thereto. Therefore, under this statutory authority, Obad could not recover the seized currency prior to the State's initiating forfeiture proceedings by way of a "petition."

Because Obad was not an "owner of record," he could not successfully seek return of the currency under § 28-431, and in any event, because he was without statutory authority to initiate and seek recovery of the currency prior to the State's filing a petition for forfeiture, we conclude that the district court erred when it granted his application for return on March 5, 2008. Therefore, the court did not abuse its discretion when it vacated such order, which had instructed the State to return Obad's money and was based on erroneous reasoning regarding the State's purported failure to comply with the forfeiture statute.

[5] In his second assignment of error, Obad focuses on the propriety of the federal government's exercise of authority over the currency. In this regard, we note that in this case, at the time the district court held the first hearing on Obad's application for return of property, the seized currency had already been transferred to the federal government, which adopted the seizure in anticipation of filing federal forfeiture proceedings, and the State had not commenced—and it did not later commence—a forfeiture action. The Court of Appeals for the Eighth Circuit has explained that a federal agency's adoption of a seizure has the same effect as if the federal agency had originally seized the property on the date it was seized by the local authorities. *Madewell v. Downs*, 68 F.3d 1030 (8th Cir. 1995). In this case, the federal government proceeded to initiate forfeiture proceedings on March 19, 2008.

[6] Other courts dealing with similar facts have acknowledged that where no state forfeiture proceedings are initiated, once the property was delivered to the Drug Enforcement Agency and a federal forfeiture proceeding was instituted, state jurisdiction ended. See, *e.g.*, *U.S. v. $12,390.00*, 956 F.2d 801 (8th Cir. 1992); *Cavaliere v. Town of North Beach*, 101 Md. App. 319, 646 A.2d 1058 (1994); *Morgan v. Property Clerk*,

184 Misc. 2d 406, 708 N.Y.S.2d 262 (2000); *State v. Hill*, 153 N.C. App. 716, 570 S.E.2d 768 (2002) (stating that once federal agency has adopted local seizure, party may not attempt to thwart forfeiture by collateral attack in state courts, for at that point, exclusive original jurisdiction is vested in federal court by virtue of 28 U.S.C. § 1355 (2006)).

As noted above, the court's initial order of March 5, 2008, was in error. Here, the State had not initiated forfeiture proceedings at the time the court held its initial hearing on the application for return of property, the federal government had already adopted the seizure of the currency, and the currency was in the jurisdiction of the federal court. We find no impropriety in the transfer of the currency and the adoptive seizure by the federal government.

[7] The federal government commenced forfeiture proceedings on March 19, 2008, and thus, the currency was subject to forfeiture at the time the court conducted the hearing on the State's motion to vacate. We have stated that denial of return of property is proper where the property is subject to forfeiture. See *State v. Agee*, 274 Neb. 445, 741 N.W.2d 161 (2007). In this case, because the currency was subject to forfeiture, the court correctly vacated its earlier order directing return. We reject Obad's second assignment of error challenging the propriety of the federal government's exercise of jurisdiction and the cessation of the State's exercise of jurisdiction over the matter as reflected in its order of May 20.

CONCLUSION

As discussed above, Obad had no statutory authority to bring or successfully request the return of the seized currency under § 28-431. Although our reasoning differs from that of the district court, see *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005), we nevertheless affirm the district court's order of May 20, 2008, which vacated its initial order of March 5 and ultimately denied Obad's application for the return of property.

AFFIRMED.

HEAVICAN, C.J., not participating.

DAVID KLINE AND PATRICIA L. KLINE, APPELLANTS, V. FARMERS INSURANCE EXCHANGE, APPELLEE.

766 N.W.2d 118

Filed June 5, 2009. No. S-07-325.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Motor Vehicles: Contracts.** Neb. Rev. Stat. § 44-6408(2) (Reissue 2004) does not prevent insurers from entering into agreements with insureds providing more underinsured motorist coverage limits than those required by § 44-6408(2).
4. ____: ____: ____. Insurers may provide insurance policies with more favorable terms and conditions than are required by the Uninsured and Underinsured Motorist Insurance Coverage Act, but insurers are prohibited from issuing policies that carry terms and conditions less favorable to the insured than those provided by the act.
5. ____: ____: ____. An insurer that provides higher underinsured motorist coverage limits than are required by Neb. Rev. Stat. § 44-6408(2) (Reissue 2004) does not thereby escape the minimum requirements of the Uninsured and Underinsured Motorist Insurance Coverage Act. Likewise, an insured who pays for higher coverage does not forfeit the protections of the act.
6. ____: ____: ____. Unless one of the exclusions set forth in Neb. Rev. Stat. § 44-6413 (Reissue 2004) applies, an insured is entitled to recover for injuries sustained in any accident, so long as the injuries were caused by an uninsured or underinsured motor vehicle. In other words, the exclusions provided by the Uninsured and Underinsured Motorist Insurance Coverage Act in § 44-6413 are the only exceptions permitted to the coverage mandated by the act.
7. **Insurance: Motor Vehicles: Damages.** The purpose of the Uninsured and Underinsured Motorist Insurance Coverage Act is to provide a means whereby victims of less than adequately insured motorists are made as nearly whole as possible.
8. **Insurance: Motor Vehicles: Legislature: Intent.** A court must construe the provisions of the Uninsured and Underinsured Motorist Insurance Coverage Act liberally to accomplish the indicated legislative purpose.
9. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

10. ____: ____. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
11. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

John C. Wieland and Kevin J. McCoy, of Dwyer, Smith, Gardner, Slusky, Lazer, Pohren & Rogers, L.L.P., for appellants.

Daniel P. Chesire, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

Farmers Insurance Exchange (Farmers) petitioned for further review the decision of the Nebraska Court of Appeals finding an exclusion in its automobile insurance policy to be void as against public policy. The exclusion denies underinsured motorist (UIM) coverage when a person is injured while occupying a vehicle he or she does not own but is insured for UIM coverage under another policy. We granted Farmers' petition for further review. We affirm.

II. BACKGROUND

For the most part, the facts of this case are undisputed. On December 29, 2001, David Kline was returning from work, driving a 1985 GMC Suburban, when Donald C. Minard turned left in front of the Suburban. The vehicles collided, and, as a result of the collision, David was injured. David is the sole shareholder of "Blade Home Improvement LLC" (Blade), a

Nebraska limited liability company. Blade is the titled owner of the Suburban.

The Suburban was insured through American Family Mutual Insurance Company (American Family) for collision and liability, and the policy included UIM benefits of $100,000 per person and $300,000 per accident. David and Patricia L. Kline also held a personal automobile insurance policy through Farmers providing UIM benefits of $500,000 per person and $500,000 per accident. The only vehicle listed under the Farmers' policy was the Klines' family vehicle, a 2001 Ford Windstar van.

The Klines filed suit against Minard for the injuries David sustained from the accident, and they also named as defendants Farmers and American Family. The Klines sought a determination of liability for the UIM benefits under the insurance policies and for payment under those policies. Minard's insurance company paid its policy limit of $25,000 on his behalf, and Minard was dismissed from the case. Before settling with Minard, both American Family and Farmers waived subrogation rights. American Family then paid its maximum per person coverage of $100,000 in UIM benefits and was also dismissed from the case.

The Klines thus received a total of $125,000 from the settling defendants. But the Klines assert that their damages exceeded that amount. Farmers, the sole remaining defendant, filed a motion for summary judgment. The Klines did not cross-motion for summary judgment. In support of its motion, Farmers argued that its insurance policy with the Klines contained two relevant exclusions that prohibited them from recovering. Under the UIM section, the policy stated:

> This coverage does not apply to bodily injury sustained by a person:
>
> (1) While occupying any vehicle owned by you or a family member for which insurance is not afforded under this policy or though [sic] being struck by that vehicle.
>
> . . . .
>
> (4) If the injured person was occupying a vehicle you do not own which is insured for *this coverage* under another policy.

(Emphasis supplied.)

At the motion for summary judgment hearing, Farmers argued that if the court determined that David was actually the owner of the Suburban and not Blade, then exclusion No. 1 (hereinafter referred to as the "owned-but-not-insured" exclusion) applied, which would preclude coverage under the policy. But, if the court concluded that Blade was the owner of the Suburban and not David, then exclusion No. 4 (hereinafter referred to as the "not-owned-but-insured" exclusion) applied.

No evidence was introduced to refute that Blade was the actual owner of the Suburban. To the contrary, the Klines maintained that the owned-but-not-insured exclusion was inapplicable because Blade, and not David, was the owner of the Suburban. In support of their argument, the Klines offered the American Family insurance policy listing Blade as the owner of the Suburban and they offered David's deposition testimony that Blade owned the Suburban. Farmers responded that by piercing the corporate veil, the court could conclude that David was the actual owner of the Suburban, but Farmers did not introduce any evidence to support this allegation.

The Klines' argument regarding the not-owned-but-insured exclusion was twofold. First, the Klines argued that "this coverage" as used in the not-owned-but-insured exclusion is ambiguous. They maintained that the language could refer to both the type of coverage and the amount of coverage. And since Farmers drafted the policy, the language should be construed against Farmers to mean the amount of coverage. Since the amount of the UIM coverage provided through Blade's contract with American Family was a different amount than the UIM coverage provided through Farmers' policy with the Klines, the Klines argued that the exclusion from "this coverage" did not apply.

Second, the Klines argued that even if the not-owned-but-insured exclusion was unambiguous as to what "this coverage" meant, then the exclusion violated public policy, because it allowed Farmers to deny UIM benefits whenever underinsured coverage was available in a lesser amount under another policy, preventing an insured from receiving full indemnification

to the extent of the highest policy limit as mandated by Nebraska's stacking statute codified at Neb. Rev. Stat. § 44-6411 (Reissue 2004).

The district court granted Farmers' second motion for summary judgment, concluding that based on the evidence submitted by the parties, the Farmers' policy excluded coverage whether David owned the Suburban or not. The court concluded that the "this coverage" language contained in the not-owned-but-insured exclusion was not ambiguous and referred only to the type of coverage, not the amount of coverage. The court also found that the not-owned-but-insured exclusion did not violate public policy. The court then reasoned that if David owned the Suburban, then the owned-but-not-insured exclusion applied, and if he did not own the vehicle, then the not-owned-but-insured exclusion applied. The Klines timely appealed to the Court of Appeals.

In a memorandum opinion, the Court of Appeals reversed the decision of the district court granting summary judgment in favor of Farmers and remanded the cause for further proceedings.[1] The Court of Appeals first concluded that the owned-but-not-insured exclusion was inapplicable because Blade, not David, owned the Suburban. As to the not-owned-but-insured exclusion, the Court of Appeals agreed with the district court that the language "this coverage" was not ambiguous. However, the Court of Appeals held that the not-owned-but-insured exclusion violated public policy in circumstances such as the Klines, where the nonowned vehicle's underinsured coverage limits are less than the UIM coverage on the insured's own vehicle.

We granted Farmers' petition for further review of the Court of Appeals' decision. The Klines did not file a cross-petition for further review, but instead filed a brief with a cross-appeal.

III. ASSIGNMENTS OF ERROR

Farmers alleges the Court of Appeals erred in (1) holding that the not-owned-but-insured exclusion is void as against

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[1] *Kline v. Farmers Ins. Exch.*, No. A-07-325, 2008 WL 2388768 (Neb. App. June 10, 2008) (selected for posting to court Web site).

public policy under Nebraska's Uninsured and Underinsured Motorist Insurance Coverage Act (UUMICA)[2] and (2) concluding as a matter of law that Blade owns the Suburban.

The Klines filed a brief for cross-appeal on further review, alleging the Court of Appeals erred in concluding that the language "this coverage" in the not-owned-but-insured exclusion was not ambiguous as to whether it refers to the type of coverage or the amount of coverage. The Klines also argue that the Court of Appeals' statement that public policy would only be violated when the excluded UIM coverage was greater than the amount of UIM coverage provided under another policy was an improperly narrow interpretation of the UIM statutes.

IV. STANDARD OF REVIEW

[1] The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.[3]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

V. ANALYSIS

1. Cross-Appeal on Further Review

First, we address whether the Klines properly perfected their cross-appeal from the Court of Appeals' decision. Farmers asserts that the Klines are precluded from cross-appealing because they failed to file a cross-petition for further review. This argument is without merit. Neb. Ct. R. App. P. § 2-102(H) provides that each party may file additional briefs in compliance

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[2] Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2004).

[3] *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000).

[4] *Jones v. Shelter Mut. Ins. Cos.*, 274 Neb. 186, 738 N.W.2d 840 (2007); *Johnson v. Knox Cty. Partnership*, 273 Neb. 123, 728 N.W.2d 101 (2007).

with Neb. Ct. R. App. P. § 2-109 when further review is granted. Section 2-109 allows appellees to file a cross-appeal by noting on the cover of their brief "Brief on Cross-Appeal." This is exactly what the Klines did. Further, we note that the Klines were successful in the Court of Appeals; therefore, they had no reason to file a petition for further review. However, once Farmers filed a petition for further review, the only way for the Klines to preserve any errors would be to file a cross-appeal. As such, we conclude that the Klines properly perfected their cross-appeal on further review by complying with our court rules. We turn now to the exclusions in issue.

2. Exclusions

(a) Not-Owned-But-Insured Exclusion and § 44-6413

The Court of Appeals held that the not-owned-but-insured exclusion was void for public policy reasons. But Farmers maintains that the not-owned-but-insured exclusion is consistent with the purpose of the UUMICA. The not-owned-but-insured exclusion provides that its UIM coverage does not apply if the injured person sustains bodily injury while occupying a vehicle that person does not own, and such vehicle is insured for "this coverage" under another insurance policy.

David was injured by an underinsured motor vehicle as defined by the UUMICA. The UUMICA defines an underinsured motor vehicle as a "motor vehicle with respect to the ownership, operation, maintenance, or use of which there is bodily injury liability insurance . . . applicable at the time of the accident and the amount of the insurance . . . is less than . . . the damages for bodily injury, sickness, disease, or death sustained by the insured."[5] UIM coverage has been defined as "first party coverage that affords compensation for injured persons whenever a tortfeasor is inadequately insured."[6]

[3] Although the Klines and Farmers contracted for UIM coverage higher than the coverage limits mandated by the

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[5] § 44-6406.

[6] 2 Alan L. Widiss & Jeffrey E. Thomas, Uninsured and Underinsured Motorist Insurance § 31.4 at 5 (rev. 3d ed. 2005). Accord *Anderson v. MSI Preferred Ins. Co.*, 281 Wis. 2d 66, 697 N.W.2d 73 (2005).

UUMICA, the protections of the UUMICA are still applicable. The UUMICA requires that any liability policy insuring against bodily injury, sickness, disease, or death sustained by a person arising out of the ownership, operation, maintenance, or use of a motor vehicle must provide UIM coverage in limits of $25,000 per person and $50,000 per accident.[7] Under § 44-6408(2), if an insured requests higher UIM limits, the insurer must provide UIM coverage limits of at least $100,000 per person and $300,000 per accident. Section 44-6408(2) does not prevent insurers from entering into agreements with insureds providing more UIM coverage limits than those required by § 44-6408(2).[8]

[4,5] We have explained that insurers may provide insurance policies with more favorable terms and conditions than are required by the UUMICA, but insurers are prohibited from issuing policies that carry terms and conditions less favorable to the insured than those provided by the UUMICA.[9] As such, an insurer that provides higher UIM limits than are required by § 44-6408(2) does not thereby escape the minimum requirements of the UUMICA.[10] Likewise, an insured who pays for higher coverage does not forfeit the protections of the UUMICA.[11]

[6] Section 44-6413 of the UUMICA contains certain allowable exclusions from UIM coverage. Unless one of the exclusions set forth in § 44-6413 applies, an insured is entitled to recover for injuries sustained in any accident, so long as the injuries were caused by an "[u]ninsured motor vehicle"[12] or an "[u]nderinsured motor vehicle."[13] In other

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[7] § 44-6408(1).

[8] See *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). See, also, *Van Ert v. State Farm Mut. Auto. Ins. Co.*, 276 Neb. 908, 758 N.W.2d 36 (2008).

[9] See, *Van Ert v. State Farm Mut. Auto. Ins. Co.*, *supra* note 8; *Steffen v. Progressive Northern Ins. Co.*, *supra* note 8.

[10] See *id.*

[11] See *id.*

[12] § 44-6405. See, also, § 44-6407.

[13] § 44-6406. See, also, § 44-6407.

words, the exclusions provided by the UUMICA in § 44-6413 are the only exceptions permitted to the coverage mandated by the UUMICA.[14]

The allowable exclusions contained in § 44-6413 provide that coverage under the UUMICA shall not apply when the bodily injury occurs (1) while the "insured" is occupying a motor vehicle owned by, but not insured by, the "named insured"; (2) while the insured is occupying an owned motor vehicle that is used as a public conveyance; (3) where the insured is struck by a vehicle owned by the named insured or a spouse or a relative residing with the named insured; or (4) where the statute of limitations has run on the claim. Section 44-6413 does not set forth an exception for vehicles not owned by the insured, but that are insured for "this coverage" under another policy.

Farmers fails to explain, and we cannot determine, how the not-owned-but-insured exclusion fits into one of the allowable exclusions. Accordingly, the not-owned-but-insured exclusion is an unsuccessful attempt by Farmers to broaden the allowable exclusions contained in § 44-6413 and provide less favorable UIM coverage than allowed by our UIM statutes.[15] As written, the not-owned-but-insured exclusion would prevent a victim from recovering UIM benefits even in a situation where the victim has only received UIM benefits in the minimum amount of $25,000. And, under the exclusion, an insured would be more adequately protected from tort-feasors in a vehicle with no UIM coverage. This is clearly not what the Legislature intended when it enacted the UUMICA.

When the Legislature enacted the UUMICA, it clearly did not contemplate the not-owned-but-insured exclusion. Nebraska's stacking statute is codified within the UUMICA at § 44-6411. Section 44-6411 provides that when an insured has the right to recover under multiple uninsured or UIM motorist policies, the insured's maximum recovery is limited to the highest limit of any one of the applicable policies and sets forth the priorities

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[14] *Steffen v. Progressive Northern Ins. Co.*, *supra* note 8.

[15] See 46A C.J.S. *Insurance* § 2242 (2007).

of the claims. Clearly, the Legislature considered that some insureds may have multiple uninsured or UIM policies, and so long as the insured's maximum recovery was limited to the highest limit of any one of the applicable policies, recovery above the mandatory limits in § 44-6408 is allowable.

In the present case, the Klines paid an extra premium to Farmers for UIM benefits up to $500,000 in the event they were injured by the actions of an underinsured motorist. Now, David has been injured and has been placed in a position where, in order to be made as nearly whole as possible, he may need to utilize part of the underinsured benefits he paid and contracted for with Farmers. Farmers now attempts to deny payment under the not-owned-but-insured exclusion. But Farmers cannot avoid payment under the not-owned-but-insured exclusion because the not-owned-but-insured exclusion, as written, contravenes the UUMICA. This result supports the public policy concerns and purpose of the UUMICA.

[7,8] We have explained that the purpose of the UUMICA is to provide a means whereby victims of less than adequately insured motorists are made as nearly whole as possible.[16] And we must construe the provisions of the UUMICA liberally to accomplish the indicated legislative purpose.[17] Under the not-owned-but-insured exclusion, victims are prevented from being made as nearly whole as possible. To hold as Farmers suggests would stymie the intended purpose of the UUMICA, and such a result would be inconsistent with the conclusions of other jurisdictions that have considered the enforceability of exclusions similar or identical to the not-owned-but-insured exclusion.

Other jurisdictions have concluded that exclusions similar or identical to the not-owned-but-insured exclusion violate public policy when interpreted to disallow an insured from recovering UIM benefits if the insured is injured while occupying a

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[16] *Ostransky v. State Farm Ins. Co.*, 252 Neb. 833, 566 N.W.2d 399 (1997); *Luedke v. United Fire & Cas. Co.*, 252 Neb. 182, 561 N.W.2d 206 (1997).

[17] See *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001).

vehicle which he or she does not own and which is insured for UIM coverage under another policy.[18]

For example, in *Veach v. Farmers Ins. Co.*,[19] Greg Veach was injured by an underinsured motorist while riding his motorcycle. Veach received payment for his injuries from both the other motorist and his own insurance policy, totaling $125,000.[20] Veach was also an "insured" under his mother's insurance policy with Farmers Insurance Group of Companies from which he sought payment.[21] His mother's UIM policy limit with that insurance company was $50,000 per person, per occurrence.[22] The insurance policy contained an exclusion identical to the not-owned-but-insured exclusion in the present case, and the company denied payment.[23] The Iowa Supreme Court concluded that the exclusion was void because it "frustrates the purpose of the [UIM] coverage and because it is contrary to 'common sense and the consuming public's general understanding of coverage under these circumstances.'"[24] In so concluding, the Iowa Supreme Court reasoned that such an exclusion creates a situation where an insured is more protected in a vehicle with no UIM coverage than one with the statutory minimum.

Similarly, in *Estate of Sinn v. Mid-Century Ins. Co.*,[25] the Fifth District Appellate Court of Illinois held that exclusions intended to prevent UIM coverage when the policyholder occupies a vehicle he or she does not own were void for public policy reasons. In *Estate of Sinn*, the insured victim's policy

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[18] *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845 (Iowa 1990); *Estate of Sinn v. Mid-Century Ins. Co.*, 288 Ill. App. 3d 193, 679 N.E.2d 870, 223 Ill. Dec. 419 (1997); *Erickson v. Farmers Ins. Co. of Oregon*, 331 Or. 681, 21 P.3d 90 (2001). See 2 Irvin E. Schermer & William J. Schermer, Automobile Liability Insurance § 25:10 (4th ed. 2004).

[19] *Veach v. Farmers Ins. Co.*, *supra* note 18.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 848.

[25] *Estate of Sinn v. Mid-Century Ins. Co.*, *supra* note 18.

contained the same not-owned-but-insured exclusion. In concluding that the exclusion was void, the court reasoned that as the exclusion was written, "it could operate to deprive the insured of the full coverage provided in his policy should the other, nonowned vehicle have underinsured motorist coverage in a lesser amount than that provided in the insured's policy."[26] Additionally, the court noted that because the purpose of UIM coverage was to place the insured in the same position he or she would have been in if the tort-feasor had carried adequate insurance, such an exclusion violated public policy.[27]

Considering the public policy concerns, we conclude that the not-owned-but-insured exclusion, in the context of UIM coverage, contravenes the UUMICA and is, therefore, void.

(b) Klines' Cross-Appeal on Further Review

The Klines argue in their cross-appeal on further review that if we conclude that the not-owned-but-insured exclusion is permissible, it is still inapplicable because "this coverage," as it is used in the not-owned-but-insured exclusion, is ambiguous in that it could refer to the type of coverage, i.e., UIM coverage, or the amount of coverage, i.e., policy limits. Because we concluded that the not-owned-but-insured exclusion violates public policy and § 44-6413, we do not reach the Klines' assignment of error on cross-appeal.[28]

(c) Owned-But-Not-Insured Exclusion

Next, Farmers asserts that the Court of Appeals erred in holding that, as a matter of law, the owned-but-not-insured exclusion did not apply. Farmers argues that even if the not-owned-but-insured exclusion is void, there remains a material issue of fact whether coverage is precluded by the owned-but-not-insured exclusion. The owned-but-not-insured exclusion applies to vehicles "owned by you or a family member." The parties do not argue that this provision is ambiguous but dispute whether the Suburban was "owned by" David or any

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[26] *Id.* at 196, 679 N.E.2d at 872, 223 Ill. Dec. at 421.

[27] *Estate of Sinn v. Mid-Century Ins. Co.*, *supra* note 18.

[28] See, *Nielsen v. Nielsen*, 275 Neb. 810, 749 N.W.2d 485 (2008); *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007).

members of his family. The Court of Appeals concluded that the owned-but-not-insured exclusion did not apply, because it determined that there was no material issue of fact that Blade owned the Suburban. We agree.

In its brief, Farmers maintains that it did not concede the issue of who actually owned the Suburban, but was only arguing that Blade owned the vehicle as part of its alternative argument that the not-owned-but-insured exclusion applied. In its argument concerning the owned-but-not-insured exclusion, Farmers alleged that David, and not Blade, owned the Suburban. Farmers did not present any evidence as to the ownership of the vehicle. The district court was correct that, assuming both exclusions were valid, the issue of who owned the vehicle was immaterial, because, either way, coverage was excluded. But because the not-owned-but-insured exclusion is not a valid provision, the ownership of the vehicle is now a material issue of fact.

[9-11] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.[29] A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.[30] After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[31]

Farmers moved for summary judgment. As to the owned-but-not-insured exclusion, Farmers thus bore the burden to show that there was no issue of material fact as to whether the Suburban was a "vehicle owned by you or a family member." It clearly

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[29] *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

[30] *Controlled Environ. Constr. v. Key Indus. Refrig.*, 266 Neb. 927, 670 N.W.2d 771 (2003).

[31] *Misle v. HJA, Inc.*, 267 Neb. 375, 674 N.W.2d 257 (2004).

did not sustain that burden. And the Klines, in response to Farmers' allegations in its motion for summary judgment, provided ample evidence to show that Blade was the owner of the Suburban. An agent with American Family testified by affidavit that American Family "issued a policy of insurance to Blade . . . insuring a 1985 GMC Suburban." Further, the Suburban was titled in the name of Blade. Although Farmers argues that the issue of who owns the Suburban has not been conceded, viewing the evidence presented, we can only conclude that Blade is the owner of the Suburban. By not presenting any evidence that would put the ownership of the vehicle into controversy, Farmers took the risk that the not-owned-but-insured exclusion would be held void and that the ownership question would be decided against it in its motion for summary judgment.

Thus, reviewing the evidence in the light most favorable to the nonmoving party, we agree with the Court of Appeals that Farmers did not meet its burden for summary judgment to show the Suburban was owned by David, rather than Blade. As such, the Court of Appeals was correct in holding that there was no material issue of fact that the owned-but-not-insured exclusion does not apply.

VI. CONCLUSION

We conclude that the not-owned-but-insured exclusion violates the UUMICA. Therefore, we affirm the decision of the Court of Appeals, which reversed the district court's entry of summary judgment in favor of Farmers and remanded the cause for further proceedings.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JUNEAL DALE PRATT, APPELLANT.
766 N.W.2d 111

Filed June 5, 2009. No. S-08-279.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.

2. **DNA Testing: Appeal and Error.** In an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008), the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Motions for New Trial: DNA Testing: Appeal and Error.** A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act is addressed to the discretion of the trial court. Absent an abuse of discretion, the court's determination will not be disturbed.
4. **Motions to Vacate: DNA Testing: Appeal and Error.** A court may vacate and set aside the judgment in circumstances where, under the DNA Testing Act, the DNA testing results, when considered with the rest of the evidence of the case in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.
5. **Motions for New Trial: DNA Testing.** To warrant a new trial, the court must determine that newly discovered exculpatory evidence obtained pursuant to the DNA Testing Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.
6. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of the case should not be relitigated at a later stage.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Affirmed.

James R. Mowbray and Jerry L. Soucie, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Juneal Dale Pratt appeals from the Douglas County District Court's denial of his motion for relief under Nebraska's DNA Testing Act (the Act), Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008). In 1975, Pratt was convicted of sodomy, rape, and two counts of robbery. His convictions were affirmed on direct appeal,[1] and we later denied him postconviction relief.[2]

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[1] *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977).

[2] *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987).

In June 2004, Pratt filed a motion under the Act to have items still in evidence tested for the presence of DNA. After those items were tested, Pratt sought a certification from the district court authorizing an out-of-state deposition with a subpoena duces tecum of one of the victims in order to obtain a known sample of her DNA.

After the district court granted Pratt's motion, the State appealed. We found that we did not have jurisdiction because the certification was not a final, appealable order, and we dismissed the appeal.[3] The district court then vacated its order, found that Pratt could not collect a known DNA sample from his victim, and denied Pratt's motion to vacate his sentence or, in the alternative, motion for new trial. Pratt appeals the decision of the district court, arguing that it had no authority to vacate its prior certification. Pratt also argues that the DNA evidence was enough to exonerate him or, alternatively, that the evidence was exculpatory and warranted a new trial. We affirm.

BACKGROUND

The facts of the case can be found in our prior decisions,[4] but because Pratt is now arguing that the DNA evidence is at least exculpatory, we revisit the pertinent facts here. The victims in this case both testified at trial that they had separately picked Pratt out of a three-man lineup. Each victim also identified Pratt in a voice lineup, without any visual contact with the persons participating in the voice lineup. Both victims testified that they recognized Pratt's shoes during the lineup as the shoes of the man who had assaulted them. One victim testified that the shoes were distinctive because they were black patent leather with "suede in the middle." In addition, Pratt was wearing a ring at the lineup that both victims testified belonged to one of them.

Another robbery victim testified that approximately 1 week after the first attack, Pratt had robbed her in the same hotel where the first attack took place. Several police officers

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[3] *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007).

[4] *Pratt*, *supra* note 3; *Pratt*, *supra* note 2; *Pratt*, *supra* note 1.

testified regarding the chase and apprehension of Pratt after the second robbery.

Pratt testified in his own defense and gave an alibi for the sexual assault. Pratt claimed to have had an injured leg at the time and therefore had been physically incapable of the attack. Pratt also testified that he was at home on the evening of the attack. This testimony contradicted statements Pratt gave to police at the time of his arrest. Both Pratt's mother and his live-in girlfriend testified in his defense, confirming his alibi. Pratt's sister testified that the ring he had been wearing was her ring and not the victim's ring. She further testified that Pratt often wore her clothing and jewelry. Pratt claimed that he was at the hotel at the time of the second robbery, because he was renting a room in order to have sex with a different girlfriend.

On June 9, 2004, Pratt filed an amended motion under the Act to have items still in evidence from the sexual assault tested for DNA. The motion was granted, and the clothing that had been worn by the victims at the time of the attack was tested for biological material. After the testing was conducted, Pratt sought a certification from the Douglas County District Court for a subpoena duces tecum to compel a DNA sample from one of the victims. Pratt claimed that with the victim's DNA, the DNA testing laboratory would be able to construct a complete profile that would result in his exoneration.

The district court granted the certification, and the State appealed, claiming that Pratt did not have the right to compel the victim to give a DNA sample under the Act. We determined that we did not have jurisdiction because the certification from the district court was not a final, appealable order and dismissed the case.[5] Two concurring opinions suggested that Pratt did not have the right to obtain the victim's DNA through a subpoena duces tecum under the Act.[6]

After the case was sent back to the district court, the certification was vacated and a hearing was held on Pratt's motion

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[5] *Pratt*, *supra* note 3.

[6] *Id.* (Heavican, C.J., concurring) (Miller-Lerman, J., concurring; Stephan, J., joins).

to vacate his convictions under the Act or, in the alternative, motion for new trial. Pratt claimed that the DNA evidence, considered along with his alibi defense from trial, was sufficient to warrant vacating his convictions or, alternatively, to award him a new trial. Pratt claimed that the lineup in which he participated was highly suggestive and that the victims' identification, both in court and in the lineup, could not be trusted.

Kelly Duffy, a medical technologist, testified regarding the DNA results. Duffy stated that the results were inconclusive, that it was impossible to know when or how the DNA was deposited on the shirts, and that there was no evidence that any of the DNA was contributed from sperm, although it could have been. Duffy also testified that seven items of clothing, including both victims' clothing as well as Pratt's clothing, were stored in the same box. The clothing was not separately packaged or bagged in the box. Duffy testified that the DNA detected could be from epithelial cells and that handling the clothing could be enough to deposit the DNA.

After preliminary testing, the two shirts worn by the victims at the time of the attack were found to have "stains" that might contain DNA. None of the stains were found to be presumptively from semen. The stains, although invisible to the naked eye, fluoresced under a particular kind of light used during the testing of the clothing. A red, white, and blue shirt worn by one victim at the time of the attack had eight different stained areas, labeled B1 through B8. A yellow flowered shirt worn by the other victim had five stained areas, C1 through C5a.

Two of the areas on the red, white, and blue shirt, B4 and B7, showed the presence of male DNA, and one area, B1, was inconclusive as to whether male DNA was present. Area B4 may or may not have been a mixture of one or more individuals, and if it was not a mixture, then Pratt would be excluded. Area B7 was a mixture of more than one individual's DNA, and at least one of those individuals was male. The results were inconclusive as to how many males contributed to the mixture, but at least one of those males was not Pratt.

Partial DNA profiles were obtained from all five stained areas on the yellow flowered shirt. Area C4 showed the presence of

male DNA, while area C5 showed the possible presence of male DNA. Area C4 was a mixture of at least two people, one of them male, and Pratt could not be excluded as a contributor. Area C5 was also a mixture of at least two people, possibly more than one female and/or more than one male. Pratt could not be excluded as a contributor at area C5.

After the hearing, the district court denied Pratt's motion to vacate his conviction as well as his motion for new trial. In its order, the district court cited the fact that the evidence was stored in such a way that it was impossible to tell how or when the DNA was deposited on the clothing. The district court found that the results of the DNA testing were largely inconclusive and that while the testing did not conclusively show that Pratt was a contributor, neither did it eliminate him as a contributor. Pratt appeals the denial of his motions.

ASSIGNMENTS OF ERROR

Pratt assigns, restated and consolidated, that the district court erred by (1) vacating the subpoena duces tecum, (2) refusing to vacate Pratt's convictions based on the DNA evidence, and (3) failing to order a new trial based on the DNA evidence.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[7]

[2,3] In an appeal from a proceeding under the Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[8] A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the Act is addressed to the discretion of the trial court. Unless an abuse of discretion is shown, the court's determination will not be disturbed.[9]

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[7] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[8] *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006).

[9] See *id.*

[4] A court may vacate and set aside the judgment in circumstances where, under the Act, the DNA testing results, when considered with the rest of the evidence of the case in the underlying judgment, show a complete lack of evidence to establish an essential element of the crime charged.[10]

[5] To warrant a new trial, the court must determine that newly discovered exculpatory evidence obtained pursuant to the Act must be of such a nature that if it had been offered and admitted at the former trial, it probably would have produced a substantially different result.[11]

ANALYSIS

District Court Had Authority to Vacate Its Previous Order

Pratt first contends that the district court did not have the right to vacate its certification for a subpoena duces tecum for the out-of-state victim's DNA. Pratt claims that because of the law-of-the-case doctrine, the issue of whether he had a right to the victim's DNA had already been litigated and that the district court did not have the authority to change its order. Pratt's argument fails for two reasons.

[6] First, the law-of-the-case doctrine reflects the principle that an issue that has been litigated and decided in one stage of the case should not be relitigated at a later stage.[12] The doctrine applies with greatest force when an appellate court remands a case to an inferior tribunal. Upon remand, a district court may not render a judgment or take action apart from that which the appellate court's mandate directs or permits.[13] A decision that could have been challenged at a previous stage of litigation, which was not challenged, is deemed to become the law of the case.[14]

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[10] See *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

[11] *Buckman*, *supra* note 10.

[12] *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

[13] *Id.*

[14] *Id.*

In this case, the State had earlier appealed the district court's certification of a subpoena duces tecum and we determined that we did not have jurisdiction because it was not a final, appealable order.[15] The law-of-the-case doctrine does not apply under these circumstances, where we did not decide the substance of the matter but instead dismissed the appeal, sending the cause back to the district court. Therefore, the district court retained the authority to vacate or modify its decision granting a certification for a subpoena of the out-of-state victim.

We have since decided the issue of whether a person may obtain a DNA sample from a third party under the Act. In *State v. McKinney*,[16] we stated that Nebraska has no rule or statute that would authorize a defendant to collect DNA from a third party. Even if having the victim's DNA would help interpret the testing results, Pratt has not established a right to such. Pratt's first assignment of error is without merit.

DNA Evidence Does Not Exonerate or Exculpate Pratt

Pratt also argues that the DNA evidence was enough to exonerate him or, in the alternative, that the evidence was sufficiently exculpatory to warrant a new trial. Associated with this claim is Pratt's assertion that the district court erred when it determined there was a high probability the evidence had been compromised. We find no error in the district court's decision.

Section 29-4119 of the Act defines exculpatory evidence as "evidence which is favorable to the person in custody and material to the issue of the guilt of the person in custody." Under § 29-4123, the court may, on its own motion or after a hearing, vacate a judgment or order a new trial when the results exculpate or exonerate the defendant.

In an appeal from a proceeding under the Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. A motion for new trial based on newly discovered exculpatory evidence obtained pursuant to the Act

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[15] See *Pratt*, *supra* note 3.

[16] *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

is addressed to the discretion of the trial court. Unless an abuse of discretion is shown, the court's determination will not be disturbed.[17]

We have previously addressed what it means to have exculpatory or exonerating evidence.[18] In *Buckman*,[19] we stated that exonerating evidence was evidence that, when considered with the circumstances of the original trial and judgment, showed a complete lack of evidence to establish an essential element of the crime charged. We also stated that exculpatory evidence is evidence that, if it had been presented at the original trial, would probably have produced a substantially different result.

The DNA evidence in this case neither exonerates nor exculpates Pratt. First, as the district court noted, the evidence was not stored in such a way as to preserve the integrity of any DNA evidence. Although male DNA that might not be from Pratt was found on the clothing, as Duffy testified, it was impossible to tell when or how the DNA was deposited on the clothing. The articles of clothing were stored in a box without being separately packaged. Evidence stickers were present on the clothing. Duffy testified that DNA may have come from epithelial cells deposited after handling the clothing. We review factual findings of the district court for clear error, and we find none.

Second, as the district court noted in its order, the DNA testing results are, at best, inconclusive. At no point did Duffy testify that any of the male DNA on the clothing conclusively excluded Pratt from being a donor. The most Duffy could say was that one of the stains might be a mixture of male and female DNA and that if it was a mixture, Pratt would be excluded as the male donor. For two other stains determined to be a mixture of male and female DNA, Pratt could not be excluded as a donor. Therefore, the DNA evidence does not meet our standards for exculpatory or exonerating evidence.

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[17] *Poe*, *supra* note 8.

[18] *Id.*; *Buckman*, *supra* note 10; *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003).

[19] *Buckman*, *supra* note 10.

This is particularly so given the strength of the eyewitness testimony presented against Pratt. Although Pratt suggests such testimony is unreliable, we disagree. Each victim separately identified Pratt by sight and by the sound of his voice, and both victims testified that they recognized the shoes Pratt had worn during the robbery and the lineup. Both victims testified that the ring worn by Pratt at the lineup was the ring that he had stolen from one of the victims. And because Pratt testified in his own defense, the jury had the opportunity to weigh the victims' testimony against Pratt's testimony, and it clearly found the victims' testimony to be more persuasive.

Given the inconclusive nature of the DNA evidence and the strength of the eyewitness testimony at trial, the results of the DNA testing would be unlikely to produce a substantially different result if Pratt were granted a new trial.[20] Pratt's second assignment of error is also without merit.

CONCLUSION

The law-of-the-case doctrine clearly does not apply to Pratt's case, and the district court had the power to vacate its certification for a subpoena duces tecum. Furthermore, having since decided *McKinney*,[21] our law is settled that the Act does not give Pratt the right to compel DNA testing of a third party. Finally, the DNA evidence as presented by Duffy was inconclusive, because Pratt could not be excluded or included as a donor. Pratt is not entitled to have his convictions vacated or to receive a new trial.

AFFIRMED.

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[20] *Buckman, supra* note 10.

[21] *McKinney, supra* note 16.

CONCRETE INDUSTRIES, INC., APPELLANT, V. NEBRASKA DEPARTMENT OF REVENUE, A NEBRASKA ADMINISTRATIVE AGENCY, AND DOUGLAS EWALD, IN HIS CAPACITY AS THE STATE TAX COMMISSIONER FOR THE STATE OF NEBRASKA, APPELLEES.

766 N.W.2d 103

Filed June 5, 2009. No. S-08-933.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusion reached by the trial court.
4. **Statutes: Taxation.** Tax exemption provisions are strictly construed, and their operation will not be extended by construction.
5. ____: ____. Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.
6. **Statutes: Legislature: Intent.** In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
7. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
8. **Statutes: Presumptions: Legislature: Intent.** In interpreting a statute, a court is guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
9. **Taxation.** The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.
10. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
11. **Taxation: Proof.** The burden of establishing a tax exemption is placed upon the party claiming the exemption.
12. **Statutes: Sales: Taxation.** Under Neb. Rev. Stat. §§ 77-2704.22(1) and 77-2701.47 (Cum. Supp. 2006), the sale of manufacturing machinery and equipment includes the sale of items that are assembled to make manufacturing machinery and equipment.

13. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Reversed and remanded for further proceedings.

Shannon L. Doering for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Under the Nebraska Revenue Act of 1967,[1] the purchase of manufacturing machinery and equipment is exempt from sales tax. Concrete Industries, Inc., the appellant, purchased parts that it used to build its own manufacturing machinery and equipment. The question presented in this appeal is whether the Nebraska Department of Revenue correctly found that Concrete Industries' purchases were not exempt from sales tax. We conclude that Concrete Industries' purchases of parts assembled into manufacturing machinery and equipment qualified as the purchases of manufacturing machinery and equipment, and were exempt from sales tax.

BACKGROUND

Under Nebraska law, sales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental in this state of manufacturing machinery and equipment.[2] Manufacturing machinery and equipment include several categories of machinery and equipment that are purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing.[3]

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[1] Neb. Rev. Stat. §§ 77-2701 to 77-27,135.01 and 77-27,228 to 77-27,236 (Reissue 2003 & Cum. Supp. 2006).

[2] See § 77-2704.22.

[3] See § 77-2701.47.

Concrete Industries is a Nebraska corporation engaged in the business of manufacturing. In 2007, Concrete Industries purchased a number of items used in the construction of a new Ready Mixed concrete plant in Auburn, Nebraska. The items ranged from specialized machinery and electrical parts to things as simple as pipes, nuts, bolts, and wire. The items were apparently purchased separately, then assembled and configured into a "production line or other process" to "install and make operational" the new plant. In other words, instead of purchasing its manufacturing machinery and equipment preassembled, Concrete Industries bought the necessary parts and built the machinery and equipment itself. It does not appear to be disputed, for purposes of this appeal, that the machinery and equipment Concrete Industries built are of a kind that would have been exempt from sales tax had it been preassembled.

Concrete Industries filed a claim for overpayment of sales and use tax, requesting a refund of $1,279.05 that it alleged had been paid in sales tax on the items it bought to build its manufacturing machinery and equipment. The Nebraska Department of Revenue (Department) denied the claim, relying on revenue rulings in which the State Tax Commissioner opined that "purchases of raw materials or individual parts which will be used in the fabrication of manufacturing machinery and equipment where the fabricator is considered the final consumer of the machinery and equipment are taxable."[4]

Concrete Industries sought judicial review in the district court under the Administrative Procedure Act.[5] Concrete Industries argued, generally, that the Department had erred in its interpretation of the relevant statutes. Concrete Industries also alleged that the Department had violated the separation of powers principles of the state Constitution[6] and the Equal Protection Clauses of the state and federal Constitutions[7] in refusing to

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[4] Nebraska Department of Revenue Ruling 1-05-1 (Oct. 12, 2005). Accord Nebraska Department of Revenue Ruling 1-06-6 (Aug. 8, 2006).

[5] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006).

[6] See Neb. Const. art. II, § 1.

[7] See, U.S. Const. amend XIV, § 1; Neb. Const. art. I.

refund taxes paid on property the Legislature intended to be tax exempt. And Concrete Industries argued that the revenue rulings relied upon by the Department should be declared null and void because they exceeded the authority granted to the Department by the Legislature.

The district court rejected all of those arguments. The court concluded that the parts purchased by Concrete Industries were not "machinery or equipment" within the meaning of the relevant statutes. The court concluded that the revenue rulings relied upon by the Department, while they did not have the force of promulgated rules or regulations, nonetheless correctly stated the applicable law. And the court found a rational basis for the Department to exempt preassembled manufacturing machinery and equipment from sales tax and not extend that exemption to parts used to make machinery and equipment.

The court affirmed the Department's denial of Concrete Industries' refund claim. Concrete Industries appealed and filed a petition to bypass the Court of Appeals, which we granted.

ASSIGNMENTS OF ERROR

Concrete Industries assigns that the district court erred in concluding as follows:

(1) Machinery and equipment purchased as component parts and used to construct another piece of manufacturing machinery and equipment are not exempt from taxation pursuant to §§ 77-2701.47(1) and 77-2704.22(1);

(2) The Department could appropriately rely upon revenue rulings 1-05-1 and 1-06-6 without violating the Administrative Procedure Act and the separation of powers principles of the Nebraska Constitution; and

(3) The Department's arbitrary construction of §§ 77-2704.22 and 77-2701.47 did not result in a violation of Concrete Industries' right to equal protection under the U.S. and Nebraska Constitutions.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court

for errors appearing on the record.[8] But statutory interpretation presents a question of law,[9] and when reviewing a district court judgment for errors appearing on the record, an appellate court nonetheless has an obligation to resolve questions of law independently of the conclusion reached by the trial court.[10]

ANALYSIS

[4-8] Concrete Industries' first assignment of error presents an issue of statutory interpretation. We are mindful of the proposition that tax exemption provisions are strictly construed, and their operation will not be extended by construction.[11] Property which is claimed to be exempt must clearly come within the provision granting exemption from taxation.[12] But we are also mindful that in discerning the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[13] This court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.[14] And we are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.[15]

[9] The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically

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[8] *Becton, Dickinson & Co. v. Nebraska Dept. of Rev.*, 276 Neb. 640, 756 N.W.2d 280 (2008).

[9] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

[10] *Vlasic Foods International v. Lecuona*, 260 Neb. 397, 618 N.W.2d 403 (2000).

[11] *Goodyear Tire & Rubber Co. v. State*, 275 Neb. 594, 748 N.W.2d 42 (2008).

[12] *Id.*

[13] See *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

[14] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[15] See *Foster v. BryanLGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007).

excluded, at some point in the chain of commerce.[16] If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.[17] As relevant, the Nebraska Revenue Act of 1967 (hereinafter the Act) provides that "[s]ales and use taxes shall not be imposed on the gross receipts from the sale, lease, or rental and on the storage, use, or other consumption in this state of manufacturing machinery and equipment."[18]

"Manufacturing" means an action or series of actions performed upon tangible personal property, either by hand or machine, which results in that tangible personal property's being "reduced or transformed into a different state, quality, form, property, or thing."[19] And "[m]anufacturing machinery and equipment means any machinery or equipment purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing, including, but not limited to" one of eight categories of machinery and equipment articulated in § 77-2701.47(1). The term "manufacturing machinery and equipment" expressly includes "[a] repair or replacement part or accessory purchased for use in maintaining, repairing, or refurbishing machinery and equipment used in manufacturing."[20]

This exemption was enacted by the Legislature in 2005 for two primary reasons. The first reason was to try to provide smaller businesses with some of the tax advantages that had been conferred on larger businesses by the Employment and Investment Growth Act,[21] commonly known as L.B. 775.[22] The second reason was to eliminate some of the "double taxation"

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[16] *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

[17] See *id.*

[18] § 77-2704.22(1).

[19] § 77-2701.46.

[20] § 77-2701.47(1)(h).

[21] Neb. Rev. Stat. §§ 77-4101 to 77-4112 (Reissue 2003 & Supp. 2007).

[22] See, Committee on Revenue, L.B. 695, 99th Leg., 1st Sess. 44-45 (Feb. 11, 2005); Floor Debate, L.B. 312, 99th Leg., 1st Sess. 5329-32 (May 9, 2005).

that occurred when sales or use taxes were charged for items that were then taxed again as tangible personal property subject to property taxes.[23]

Those purposes are not served by the Department's construction of the Act. First, property purchased for the assembly of manufacturing machinery and equipment would, at least potentially, be "qualified property" for purposes of recovering sales and use taxes under the Employment and Investment Growth Act.[24] And second, manufacturing machinery and equipment that is constructed from component parts would be double taxed if the "sale of . . . manufacturing machinery and equipment" within the meaning of § 77-2704.22 did not include the sale of items used, by a manufacturer, to assemble machinery and equipment that would then be subject to property taxes.

[10] We are not persuaded by the Department's argument that the "mold and die" amendment set forth in § 77-2701.47(1)(c) is pertinent to our analysis. That subsection provides that manufacturing machinery and equipment include "[m]olds and dies and the materials necessary to create molds and dies for use in manufacturing . . . whether or not such molds or dies are permanent or temporary in nature . . . ."[25] The Department argues that specifically including the materials used to make molds and dies would not have been necessary had component parts used to make machinery and equipment generally been included. And, as the Department notes, a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[26]

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[23] See *id*. See, generally, Neb. Rev. Stat. § 77-201(5) (Cum. Supp. 2008); *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[24] See, generally, I.R.C. § 167 (2006); §§ 77-4103(13) and 77-4105; *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002), *overruled on other grounds, Strong v. Omaha Constr. Indus. Pension Plan*, 270 Neb. 1, 701 N.W.2d 320 (2005).

[25] § 77-2701.47(1)(c).

[26] See *State ex rel. Lanman v. Board of Cty. Commissioners*, *ante* p. 492, 763 N.W.2d 392 (2009).

But the text of the mold-and-die amendment, and the legislative history of the bill in which it was separately adopted, make clear that its purpose did not relate to the issue presented here.[27] The problem was that some molds and dies are permanent in nature but that others are made from special raw ingredients and are essentially disposable.[28] The purpose of the mold-and-die provision was to ensure that all molds and dies were being treated the same, whether they were permanent or temporary.[29] That is not the issue here, so the mold-and-die amendment does not illuminate the Legislature's intent in enacting the provisions at issue in this case.

Nor are we persuaded by the Department's argument that § 77-2701.47(1)(h), which exempts repair or replacement parts or accessories, supports its interpretation of the Act. The Department contends that under Concrete Industries' reading of the Act, the repair or replacement part or accessory provision would be superfluous.

But there is a relevant distinction between purchasing components for the assembly of manufacturing machinery and equipment and purchasing repair or replacement parts or accessories for machinery and equipment that has already been assembled. The category of items excepted by § 77-2701.47(1)(h) is broader than the category of items used to construct machinery and equipment in the first place, because items that are not part of the construction of machinery or equipment may still be purchased "for use in maintaining, repairing, or refurbishing" it.

In other words, we are not persuaded that the Department's construction of the Act is necessary to prevent § 77-2701.47(1)(h) from being rendered meaningless. Instead, we agree with Concrete Industries that § 77-2701.47(1)(h) supports its construction of the Act. As previously noted, we must assume the Legislature intended a sensible rather than absurd result

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[27] See Committee on Revenue, L.B. 1189, 99th Leg., 2d Sess. (Feb. 10, 2006).

[28] See *id.*

[29] See *id.*

in enacting a statute.[30] And it would make very little sense to exempt assembled machinery from sales and use taxes, and to exempt each and every part of that machinery from sales and use taxes if it is purchased to replace an original part, but to impose a tax on the purchase of the same parts when they are purchased to assemble the machinery in the first place.

The Department also argues that its interpretation of the Act is supported by administrative concerns. The Department suggests that an exemption for preassembled machinery and equipment is easy to administer but that an exemption for parts used to make machinery and equipment would be hard to administer, because some of those parts could be very common, like some of the items involved in this case.

[11] We are not persuaded by this argument. First of all, there is no indication in the legislative history that this was actually among the Legislature's concerns. It is the Legislature's intent, not the Department's, that is pertinent here.[31] Second, as Concrete Industries admits, the burden of establishing a tax exemption is placed upon the party claiming the exemption.[32] Thus, the duty of determining whether a manufacturer's purchase of a common part was tax exempt will fall more on the manufacturer than on the Department.

But most fundamentally, the Department cannot escape the asserted administrative inconvenience of dealing with common parts, because, as already discussed, repair and replacement parts and accessories are tax exempt, even under the Department's interpretation of the Act.[33] Those repair and replacement parts and accessories could include any of the common items that are used to repair and maintain machinery and equipment—from complicated machine parts to nuts, bolts, wires, or machine oil. And, because almost any machinery and equipment will require routine maintenance and repair,

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[30] See *Foster, supra* note 15.

[31] See *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[32] See *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008).

[33] See § 77-2701.47(1)(h).

the Department seems more likely to face those claims than circumstances in which a manufacturer constructs its own machinery and equipment from scratch.

In short, the Department is going to have to resolve refund claims for common parts in any event. We are not convinced that the Legislature intended to spare the Department that duty, because the same duty is imposed by the exemption for repair or replacement parts or accessories. The Department's claim of administrative convenience is not consistent with the Legislature's intent, as expressed in the legislative history and statutory language.

Most consumers are familiar with the ominous words "some assembly required." Those words do not mean that frustrated parents trying to assemble a bicycle on Christmas Eve have not purchased a bicycle—they have, regardless whether the bicycle's parts are assembled by a bicycle manufacturer, a toy store, or the final consumer. Similarly, a manufacturer has purchased manufacturing machinery and equipment regardless whether further assembly is required. Given the exemption's purpose, there is simply no relevant distinction between purchasing preassembled machinery or equipment, purchasing kits for assembling machinery or equipment, paying a vendor to purchase and assemble the parts, and purchasing one's own list of components to assemble into machinery and equipment. We decline to read such an irrelevant distinction into the statutes.

[12,13] We hold that under §§ 77-2704.22(1) and 77-2701.47, the "sale . . . of manufacturing machinery and equipment" includes the sale of items that are assembled to make manufacturing machinery and equipment. Therefore, we find merit to Concrete Industries' first assignment of error. Having determined that the Department's construction of the Act was incorrect, we need not consider whether the Department incorrectly relied on its own revenue rulings or whether the Department's interpretation of the Act was unconstitutional. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[34]

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[34] *McKenna v. Julian, ante* p. 522, 763 N.W.2d 384 (2009).

We also note that because the Department determined none of Concrete Industries' claims were valid, neither the Department nor the district court considered whether Concrete Industries met its burden of proving that all the items for which it claimed refunds were assembled into the manufacturing machinery and equipment that it built. For that reason, this cause will be remanded to the district court for further proceedings to determine the amount of Concrete Industries' refund.

CONCLUSION

The sale of manufacturing machinery and equipment includes the sale of items that are assembled to make manufacturing machinery and equipment, which is therefore exempt from sales and use taxes under the Act. The Department, and district court, erred in concluding otherwise. The decision of the district court is reversed, and the cause remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

DAVID J. ANDERSON, APPELLEE, V. ROBERT HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

766 N.W.2d 94

Filed June 5, 2009. No. S-08-954.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
4. **Courts: Appeal and Error.** Where an appellate court reverses and remands a cause to the district court for a special purpose, on remand, the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate.
5. ____: ____. A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.

6. **Attorney Fees.** As a general rule, attorney fees and expenses may be recovered in a Nebraska civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed in part, and in part reversed and vacated.

Jon Bruning, Attorney General, and Ryan C. Gilbride for appellant.

Michael D. Nelson and Cathy R. Saathoff, of Nelson Law, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

This habeas corpus proceeding is before us for the second time. David J. Anderson seeks credit for time he spent at liberty after he was mistakenly released from custody before the completion of his criminal sentences. The district court for Douglas County initially granted the relief sought by Anderson. Robert Houston, the director of the Nebraska Department of Correctional Services (the Department), appealed. In *Anderson v. Houston* (*Anderson I*),[1] we recognized the equitable doctrine of credit toward a sentence for time spent at liberty following a mistaken release from imprisonment, but determined that additional factual findings were necessary to determine whether Anderson was entitled to such relief. We therefore reversed, and remanded to the district court with instructions to make specific findings. On remand, the court conducted a second evidentiary hearing, made the findings required by our mandate, and again concluded that Anderson was entitled to the relief he sought. The district court also awarded Anderson attorney fees and costs. Houston, on behalf of the Department, perfected this timely appeal. We affirm the determination of the district court that Anderson is entitled to credit against his sentence for the

[1] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

time he spent at liberty, but we reverse the award of attorney fees and costs.

I. BACKGROUND

1. Basic Facts

We summarize the basic, undisputed facts which are set forth in more detail in *Anderson I*. Anderson was convicted in Douglas County District Court of a Class III felony, theft by unlawful taking, and a Class IV felony, theft by unlawful taking. On April 2, 2003, the court sentenced Anderson to 3 to 5 years' imprisonment for the Class III felony and 20 months' to 5 years' imprisonment for the Class IV felony. The court ordered the sentences to run concurrently.

On July 8, 2003, the Department mistakenly released Anderson from incarceration. The Department eventually discovered its mistake and, on September 16, filed a motion for capias and notice of hearing in the Douglas County District Court. Anderson did not appear at the hearing scheduled for September 24. That same day, the district court issued an order directing any law enforcement officers to arrest Anderson if they located him. The clerk's office did not issue that warrant for approximately 14 months.

In the interim, however, Douglas County filed a motion for declaration of forfeiture of Anderson's bail bond because Anderson failed to appear at the September 24, 2003, hearing. This motion, which was filed on March 17, 2004, and an accompanying letter were mailed to Anderson at an address specified in the certificate of service. On March 26, the court entered a default judgment forfeiting Anderson's bond.

On January 3, 2005, a little more than 9 months after the bond forfeiture proceeding, police arrested Anderson during a routine traffic stop. Anderson was then returned to the Nebraska State Penitentiary in Lancaster County. After accounting for the time Anderson was absent from prison, the Department found that his recalculated parole eligibility date was January 9, 2006, and that his new mandatory release date was January 9, 2007. After his reincarceration, Anderson commenced this habeas corpus proceeding and obtained the order which we reviewed in *Anderson I*.

2. *ANDERSON I*

In resolving the first appeal, we recognized the equitable principle that a prisoner can be granted credit against a sentence for time during which the prisoner is erroneously at liberty. We also recognized that no equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty. We held that prisoners who are aware of an erroneous release from confinement but make no effort to correct it are not entitled to equitable relief. Specifically, we stated:

> To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake. Although the prisoner need not "continue to badger the authorities," a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.[2]

We further held that the prisoner "carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature."[3]

We concluded that although the district court had specifically found that Anderson did not cause his premature release and there was no evidence before us that Anderson had committed any crimes while he was erroneously at liberty, there was an unresolved question as to whether Anderson knew that his release was premature, yet remained silent. Accordingly, we remanded to the district court for a determination of "whether Anderson tried to inform officials of their mistake and, if not, whether Anderson reasonably did not know his sentence was set to expire."[4] We further directed the district court to determine whether Anderson had or should have had notice of the

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[2] *Id.* at 931, 744 N.W.2d at 422, quoting *United States v. Merritt*, 478 F. Supp. 804 (D.D.C. 1979).

[3] *Id.* at 932, 744 N.W.2d at 423.

[4] *Id.*

September 24, 2003, hearing on the Department's motion for capias and/or Douglas County's motion to declare a forfeiture of his bond. We also directed the parties to present evidence as to why the arrest warrant for Anderson was not issued immediately after it was authorized by the district judge on September 24, and we noted that the district court should determine whether the delay was "part of an organized and diligent plan to notify, find, and reapprehend Anderson, or was instead the product of misconduct—negligent or affirmative—by public officials."[5] Finally, we directed the district court to determine the impact of any delay due to misconduct on the equities of denying Anderson credit for any or all of the 14-month period between the authorization and issuance of the arrest warrant. We wrote that "this equitable analysis should be conducted in a manner consistent with the rationale and policies expressed in this opinion."[6] Accordingly, our mandate reversed the judgment of the district court and remanded the cause for further proceedings.

3. Proceedings Following Remand

(a) Evidence

Anderson testified in person at the hearing following remand, and his deposition was received in evidence. According to the April 2, 2003, sentencing order, Anderson received credit for 76 days served in custody prior to sentencing. His two Nebraska sentences of 3 to 5 years' imprisonment and 20 months' to 5 years' imprisonment were ordered to run concurrently with each other and with "incarceration ordered in Iowa." The record does not reflect the term of the Iowa sentence. Anderson denied receiving any documents reflecting his Nebraska sentences or Iowa sentence, but he admitted that he was generally aware that he was to serve 3 to 5 years' imprisonment on his Nebraska sentences.

Anderson began serving his Iowa sentence sometime in 2002. In June 2003, he completed his Iowa sentence and was transported from Iowa to the Douglas County Correctional

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[5] *Id.* at 933, 744 N.W.2d at 423-24.

[6] *Id.* at 933, 744 N.W.2d at 424.

Center (DCCC). On July 8, 2003, after he had been at DCCC for approximately 3 weeks, Anderson was informed by a guard that he would be released if he paid an outstanding $300 fine. In his deposition, Anderson testified that he thought he still had Nebraska prison time remaining, so he asked an officer to verify the information. The officer "called downstairs to booking" and again told Anderson that he would be released if he paid the fine. Anderson further testified in his deposition that he informed the captain on the floor at DCCC that he had been sentenced to 3 to 5 years' imprisonment. The captain took Anderson to his office and showed him a computer entry indicating that only the fine was pending. Anderson paid the fine and was released on July 8.

Anderson's wife testified that when she learned of his impending release in July 2003, she was uncertain whether he had completed his sentence and she called DCCC several times to request verification. Each time, she was told that he would be released upon payment of the $300 fine. During her last call, she was told to "quit calling," so she did.

The correctional officer who processed Anderson's release on July 8, 2003, testified that he found no indication in the records that Anderson informed him that the release was erroneous. He testified that if a prisoner were to question an impending release, he would confirm the prisoner's status before completing the release. However, he admitted that he had no independent recollection of Anderson or the circumstances of his release.

Anderson testified that he did not receive notice of the motion for capias and notice of hearing filed on September 16, 2003, and that he did not reside at the address reflected on the certificate of service. Employees of the clerk of the district court testified that the 14-month delay in issuing the arrest warrant which was authorized on September 24, 2003, was the result of "human error." They acknowledged that Anderson was not responsible for the delay.

Anderson testified that he did not receive notice of the motion to declare a forfeiture of his bond filed on March 17, 2004, and that he did not reside at the address reflected on the certificate of service.

(b) Findings

Although the district court received over objection evidence of certain traffic-related offenses committed by Anderson after his release from incarceration in 2003, it subsequently concluded that it could not consider this evidence under the scope of our mandate in *Anderson I*.

The district court found that although Anderson was not aware of his actual release date, there was sufficient evidence that he questioned various prison officials in an attempt to clarify his status when told that he would be released in July 2003. The court also found that Anderson had carried his burden of demonstrating the complexity of calculating his original release date. The court further found that due to deficiencies in the notices, there was no evidence that Anderson knew or should have known about either the September 24, 2003, hearing on the motion for capias or the bond forfeiture hearing in March 2004. Finally, the district court found that the delay in the issuance of the arrest warrant was caused by the negligence of the State and that while such negligence did not amount to an affirmative act of misconduct, Anderson should not "bear the brunt of the State's negligence."

Based upon these findings, the district court determined that Anderson was entitled to "day for day credit for the one year, 5 months and 25 days he spent at liberty after he was mistakenly released by the . . . Department." The court also awarded Anderson attorney fees and costs.

II. ASSIGNMENTS OF ERROR

The Department assigns that the district court erred in (1) "failing to follow the rationale and policies of the Nebraska Supreme Court on remand," (2) imputing errors committed by Douglas County to the Department and the State of Nebraska, and (3) awarding attorney fees and costs to Anderson.

III. STANDARD OF REVIEW

[1] On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[7]

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[7] *Anderson I*, *supra* note 1.

[2,3] The construction of a mandate issued by an appellate court presents a question of law.[8] An appellate court reviews questions of law independently of the lower court's conclusion.[9]

IV. ANALYSIS

1. Issues and Findings on Remand

The Department's first assignment of error is very broad. We limit our discussion to the arguments asserted in the Department's brief, and thus consider whether the district court erred either in defining the scope of the remand or in making its factual findings on remand.[10]

(a) Scope

The Department contends that the district court erred in concluding that it could not consider traffic-related offenses committed by Anderson while at liberty under the scope of our mandate in *Anderson I*. The Department construes the mandate as requiring the district court to conduct "a full-blown evidentiary hearing in order to gather sufficient evidence to determine whether the newly articulated equitable doctrine of sentence credit for time spent at liberty applies."[11]

We do not interpret the scope of the mandate to be so broad. In *Anderson I*, we specifically noted that there was no "evidence that Anderson committed any crimes while he was erroneously at liberty."[12] We remanded the cause for the trial court to determine only "whether Anderson tried to inform officials of their mistake and, if not, whether Anderson reasonably did not know his sentence was set to expire."[13] While we noted that the "equitable analysis should be conducted in a manner

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[8] *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008); *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[9] *County of Hitchcock v. Barger*, 275 Neb. 872, 750 N.W.2d 357 (2008).

[10] See, *Walsh v. State*, 276 Neb. 1034, 759 N.W.2d 100 (2009); *Malchow v. Doyle*, 275 Neb. 530, 748 N.W.2d 28 (2008).

[11] Brief for appellant at 9.

[12] *Anderson I*, *supra* note 1, 274 Neb. at 928, 744 N.W.2d at 421.

[13] *Id*. at 932, 744 N.W.2d at 423.

consistent with the rationale and policies expressed in this opinion,"[14] this modifying sentence applied only to the specific issues upon which the remand was based.

[4,5] Where an appellate court reverses and remands a cause to the district court for a special purpose, on remand, the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate.[15] A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.[16] Because the issues on remand did not include Anderson's conduct while at liberty, the district court properly declined to consider the Department's evidence in this regard.

(b) Factual Findings

The Department contends the district court erred in concluding both that Anderson tried to inform officials of their mistake and that Anderson legitimately did not know when his sentence was set to expire. In a habeas corpus action, we review a district court's finding of fact for clear error.[17]

The district court found that after being informed of his imminent release, Anderson "questioned various prison officials in an attempt to clarify the circumstances of his release." Anderson had an officer "call down to make sure" that the release was correct. The court also specifically found that Anderson told a DCCC captain that "he had been sentenced to 3-5 years," and also asked this captain to verify that the release was correct. The court concluded that these attempts to inform authorities the release was a mistake were reasonable and that Anderson thus was entitled to equitable relief. Based upon our review of the record, we conclude that the district court's factual finding that Anderson made a reasonable attempt to inform authorities of their mistake was not clearly erroneous.

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[14] *Id.* at 933, 744 N.W.2d at 424.

[15] *VanHorn v. Nebraska State Racing Comm.*, 273 Neb. 737, 732 N.W.2d 651 (2007); *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 357 N.W.2d 455 (1984).

[16] *Id.*

[17] *Anderson I*, *supra* note 1.

We stated in *Anderson I* that if the district court determined that Anderson did not try to inform officials of a possible mistake regarding his release date, it should determine whether he reasonably did not know that his release was premature. Because we affirm the finding that Anderson actually did inform officials of what he perceived as a possible error regarding his release date, we need not address the question of whether he should have been able to precisely calculate his actual release date. We are satisfied by the record that this was not a case of "informed silence." Whether or not Anderson knew his precise release date, the record establishes that he questioned the July 2003 release and called the matter to the attention of corrections officials in order to clarify his status prior to his release. The district court correctly determined that the error in releasing Anderson prematurely was attributable solely to governmental officials, under the equitable principles established in *Anderson I*.

2. Imputing County Errors to State

In its second assignment of error, the Department argues that the district court erred in imputing errors committed by Douglas County to the Department and the State of Nebraska in conducting the equitable analysis. Notably, this issue was not raised when this case was originally presented to this court.[18] Nor was it raised to the district court after remand. And in any event, resolution of this issue is outside the scope of the remand for the same reason that resolution of the issue of Anderson's conduct while at liberty is outside the scope of the remand. This assignment of error is without merit.

3. Attorney Fees and Costs

At the hearing on remand, Anderson's counsel orally moved for an award of attorney fees and was granted leave to file an affidavit and supporting evidence on the issue. Counsel subsequently filed an affidavit and supporting documents, which showed attorney fees and expenses in the amount of $19,178.10. The affidavit did not request fees pursuant to any

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[18] See *id.*

particular statute, but instead simply noted that the fees and expenses were "fair, reasonable, and necessary with regard to the representation" of Anderson. In its final order, the district court, citing Neb. Rev. Stat. § 29-2819 (Reissue 1995), awarded "Anderson's counsel" $15,342.50 in fees and costs. The Department argues that the award was erroneous.

[6] Section 29-2819 authorizes a court in a habeas corpus action to "make such order as to costs as the case may require." As a general rule, attorney fees and expenses may be recovered in a Nebraska civil action only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[19] Other jurisdictions apply a similar standard regarding the recovery of fees in habeas corpus actions.[20] Neb. Rev. Stat. § 29-2824 (Reissue 2008) specifies various fees which can be taxed as costs in a habeas corpus proceeding, but there is no provision for an award of attorney fees.[21] No other statute specifically provides for the recovery of attorney fees in a habeas action, nor is there any recognized and accepted uniform course of procedure that allows the recovery of attorney fees in a habeas action.[22]

Anderson argues that he was entitled to counsel at public expense as a matter of due process, in that he was at risk of returning to prison if not successful in this action. He relies upon *Carroll v. Moore*,[23] holding that due process requires that an indigent defendant in a paternity proceeding be furnished appointed counsel at public expense, and *Allen v. Sheriff of Lancaster Cty.*,[24] holding that an indigent party facing incarceration for noncompliance with a purge plan in a civil contempt proceeding is entitled to appointed counsel. But the additional

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[19] *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008).

[20] See 39A C.J.S. *Habeas Corpus* § 377 (2003).

[21] See, *In re Application of Ghowrwal*, 207 Neb. 831, 301 N.W.2d 349 (1981); *State v. Konvalin*, 181 Neb. 554, 149 N.W.2d 755 (1967).

[22] See *id.*

[23] *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988).

[24] *Allen v. Sheriff of Lancaster Cty.*, 245 Neb. 149, 511 N.W.2d 125 (1994).

incarceration which Anderson faced if unsuccessful in this action was no more than that to which he was sentenced in a criminal proceeding in which he was represented by counsel and afforded due process. The issue in this civil proceeding is whether he should be relieved of a portion of that sentence on equitable grounds stemming from the State's error in releasing him prematurely. On these facts, we do not recognize a constitutional basis for taxation of Anderson's attorney fees as costs, and we conclude that the court erred in doing so. And, although § 29-2819 authorizes an award of costs in a habeas corpus action, Anderson proceeded in forma pauperis throughout this action. He therefore did not pay the costs of this action and is not entitled to recover them.[25]

V. CONCLUSION

For the reasons discussed, we conclude that the district court did not err in granting Anderson credit against his sentence for the 1 year, 5 months, and 25 days he spent at liberty as a result of his erroneous release from incarceration on July 8, 2003. However, we reverse and vacate the award of attorney fees and costs, because there is no legal basis upon which Anderson may recover his attorney fees in this action and he has not paid any costs. For the same reason, we overrule Anderson's motion for attorney fees filed in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

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[25] See Neb. Rev. Stat. §§ 25-2301 to 25-2309 (Reissue 2008).

STATE OF NEBRASKA EX REL. CHARLES O. PARKS, JR., AND EDWARD ROLLERSON, APPELLANTS, V. THE COUNCIL OF THE CITY OF OMAHA, NEBRASKA, ALSO KNOWN AS CITY COUNCIL OF OMAHA, NEBRASKA, ET AL., APPELLEES.

766 N.W.2d 134

Filed June 12, 2009. No. S-08-660.

1. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
2. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
3. **Municipal Corporations: Statutes: Appeal and Error.** When analyzing a municipal code, a legislative enactment, an appellate court follows the same rules as those of statutory analysis.
4. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.
5. **Mandamus.** Mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
6. **Mandamus: Public Officers and Employees.** Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.
7. ____: ____. A duty imposed by law which may be enforced by writ of mandamus must be one which the law specifically enjoins as a duty resulting from an office, trust, or station.
8. **Mandamus.** The general rule is that an act or duty is ministerial only if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
9. ____. A duty or act is ministerial when there is no room for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law.
10. **Public Officers and Employees.** A ministerial duty is not dependent upon a public officer's judgment or discretion—it is performed under the conditions specified in obedience to the mandate of legal authority, without regard for the exercise of the officer's judgment upon the propriety of the act being done.
11. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the

legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.

12. **Legislature.** A legislative body cannot bind its successors.
13. **Ordinances: Appeal and Error.** Interpretation of a municipal ordinance is a question of law, on which an appellate court reaches an independent, correct conclusion irrespective of the determination made by the court below.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Robert V. Broom, of Broom, Johnson, Clarkson & Lanphier, and Amy A. Miller, of ACLU Nebraska Foundation, for appellants.

Alan Thelen, Deputy Omaha City Attorney, and Michelle Peters for appellees.

Craig E. Groat, amicus curiae.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

Charles O. Parks, Jr., and Edward Rollerson (Relators) brought this action for a writ of mandamus against the Omaha City Council, seeking an order requiring the city council to employ and appropriate funds for a public safety auditor (Auditor). We conclude that the Relators have no clear legal right to the relief they seek. Accordingly, the district court did not err in denying the writ of mandamus. We affirm.

BACKGROUND

The Relators are citizens, taxpayers, registered voters, and residents of Omaha, Nebraska. They also belong to the "Coalition Against Injustice," which is an unincorporated association of Omaha citizens who are concerned with identifying and correcting injustices, including those related to police misconduct and oversight. The city council is the elected legislative body of the city of Omaha. It has the power to pass ordinances and adopt the budget for expenditures.

In July 2000, the city council adopted ordinance No. 35280, codified at Omaha Mun. Code, ch. 25, art. I, § 25-9 (2005),

which establishes the office of Auditor. The function of the Auditor is to review all citizens' complaints against any city of Omaha police officer or firefighter. Section 25-9F(2) provides that the Auditor "shall be appropriated funds in the normal city budgeting process similar to other city departments, and shall be included within the police department and fire department budget." The city council had not appropriated funds in the 2008 budget for an Auditor, and no Auditor has been employed by the city of Omaha since November 2006.

The Relators filed a petition for a writ of mandamus seeking to compel the city council to comply with § 25-9 by immediately appropriating funds for the office of the Auditor and employing an Auditor for as long as required by law. The district court issued an alternative writ of mandamus ordering the city council to carry out its obligations under § 25-9 or to show cause why a writ of mandamus should not issue. A hearing to show cause was held. After the hearing, the court denied the petition for writ of mandamus, concluding that the Relators lacked standing and that in any event, § 25-9 does not impose a ministerial duty on the city council to employ and appropriate funding for an Auditor. The Relators appeal.

ASSIGNMENTS OF ERROR

The Relators assign, restated, that the district court erred in (1) determining that the Relators did not have standing to bring a mandamus action, (2) determining that § 25-9 did not impose a legal duty on the city council to employ and appropriate funding for an Auditor, and (3) receiving certain evidence offered by the city council to aid in the interpretation of § 25-9.

STANDARD OF REVIEW

The meaning of a statute is a question of law.[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[2]

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[1] *Ahmann v. Correctional Ctr. Lincoln*, 276 Neb. 590, 755 N.W.2d 608 (2008).

[2] *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008).

ANALYSIS

The Relators' first argument is that the district court erred in concluding that they lacked standing. For purposes of this appeal, we assume, without deciding, that the Relators have alleged facts sufficient to permit them to bring the action. Instead, we turn to whether the Relators alleged facts sufficient to establish that they have a clear legal right to a writ of mandamus.

[1,2] In their second assignment of error, the Relators argue that the district court erred when it concluded that the city council did not have a ministerial duty to employ and fund an Auditor. Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of law.[3] In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.[4]

At issue in this case is whether, under § 25-9, the city council is legally obligated to employ and appropriate funding for an Auditor. The Relators argue that it is. The language of § 25-9, the Relators contend, creates a ministerial duty to employ and appropriate funds for an Auditor. Based on the plain and unambiguous language of § 25-9, however, we conclude that employing and appropriating funds for an Auditor is a discretionary function, not a ministerial act that can be compelled by mandamus.

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[3] *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007); *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006).

[4] *State ex rel. Upper Republican NRD, supra* note 3.

[3,4] Section 25-9 provides in part that "[t]he [A]uditor committee shall retain the services of [an A]uditor and his or her support staff . . . ."[5] In addition, § 25-9F(2) provides:

> *Preliminary budgeting*. Initial budget obligations shall be provided before January 1, 2001, by city council fund transfer ordinances to sustain the initial startup expenditures as required. Thereafter, and in subsequent years, the . . . [A]uditor shall be appropriated funds in the normal city budgeting process similar to other city departments, and shall be included within the police department and fire department budget.

When analyzing the Omaha Municipal Code, a legislative enactment, we follow the same rules as those of statutory analysis.[6] Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.[7]

Section 25-9 was adopted on July 25, 2000, during budget preparations for the fiscal year 2001. Because § 25-9 was adopted in the middle of budget preparations, the first sentence of § 25-9F(2), entitled "*Preliminary budgeting*," provides that the preliminary budget obligations shall be provided by fund transfer ordinances. The clear import of the first sentence of § 25-9F(2) is to establish initial budgeting for the office of the Auditor by fund transfer notices. The second sentence of § 25-9F(2), however, establishes the process by which an Auditor shall be funded in subsequent years. The plain and unambiguous language provides that after the initial budgeting process, the Auditor, like other employment positions, would be appropriated funds in the normal city budgeting process. Contrary to the Relators' assertion, § 25-9F(2) does not mandate funding for the Auditor—it mandates how the position is

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[5] § 25-9B(1).

[6] *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001). See, also, *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996).

[7] *McNally v. City of Omaha*, 273 Neb. 558, 731 N.W.2d 573 (2007).

to be funded, if the city council, in its normal budgeting process, allocates such funding. We do not read § 25-9 as compelling the employment of, or an appropriation for, an Auditor.

[5-10] Mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.[8] Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary.[9] A duty imposed by law which may be enforced by writ of mandamus must be one which the law specifically enjoins as a duty resulting from an office, trust, or station.[10] The general rule is that an act or duty is ministerial only if there is an absolute duty to perform in a specified manner upon the existence of certain facts.[11] A duty or act is ministerial when there is *no room* for the exercise of discretion, official or otherwise, the performance being required by direct and positive command of the law.[12] A ministerial duty is not dependent upon a public officer's judgment or discretion—it is performed under the conditions specified in obedience to the mandate of legal authority, without regard for the exercise of the officer's judgment upon the propriety of the act being done.[13]

[11,12] Here, § 25-9 does not create an absolute duty to perform in a specified manner. As explained above, the plain and unambiguous language of § 25-9 states that the employment and funding of an Auditor is subject to the normal budgeting process of the city of Omaha. The city's budgeting process is a discretionary activity and not subject to mandamus. While the word "shall" may render a particular provision mandatory in

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[8] *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995).

[9] *Crouse*, *supra* note 3.

[10] *State ex rel. City of Alma v. Furnas Cty. Farms*, 257 Neb. 189, 595 N.W.2d 551 (1999); Neb. Rev. Stat. § 25-2156 (Reissue 2008).

[11] *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006); *Krolikowski v. Nesbitt*, 257 Neb. 421, 598 N.W.2d 45 (1999).

[12] *Crouse*, *supra* note 3.

[13] See *State of Nebraska ex rel. Line v. Kuhlman*, 167 Neb. 674, 94 N.W.2d 373 (1959).

character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.[14] Because a legislative body cannot bind its successors,[15] we do not read the statement in § 25-9F(2) that the Auditor "shall be appropriated funds in the normal city budgeting process similar to other city departments" as mandating an allocation of funds, as opposed to a permissive exercise of the discretion associated with the normal budgeting process.

And it is clear that whether the city of Omaha should employ and fund an Auditor is a discretionary public policy decision that is entrusted to the city, as are the myriad of policy decisions involved in setting the city's budget. The decision whether to have an Auditor, and whether or how to fund the position of Auditor, requires a policy determination that is, in the absence of a constitutional question, clearly for the legislative branch. That legislative discretion is recognized by state law, which affords a metropolitan class city council the power and duty to appoint a chief of police, "and all other members of the police force *to the extent that funds may be available* to pay their salaries, and *as may be necessary* to protect citizens and property, and maintain peace and good order."[16] Although it is certainly a laudatory goal to "increase public confidence in the internal investigations process"[17] of Omaha citizens' complaints against police officers and firefighters, it is beyond our judicial authority to force the city, by granting the writ of mandamus, to appoint and fund the Auditor. The employment and funding of an Auditor is a discretionary function, not a ministerial act that can be compelled by mandamus.

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[14] *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005).

[15] See, *State ex rel. Stenberg v. Moore*, 249 Neb. 589, 544 N.W.2d 344 (1996); *State ex rel. City of Grand Island v. Union Pacific R. R. Co.*, 152 Neb. 772, 42 N.W.2d 867 (1950). See, also, *Kometscher v. Wade*, 177 Neb. 299, 128 N.W.2d 781 (1964).

[16] See Neb. Rev. Stat. § 14-601 (Reissue 2007) (emphasis supplied).

[17] § 25-9A.

This is made plain by the fact that § 25-9 expressly incorporates the normal city budgeting process, instead of establishing a separate appropriation process, or specifying an amount to be appropriated. By contrast, the cases relied upon by the Relators involve circumstances in which the amount of public funds to be expended in the performance of a ministerial duty were specified by the same law that created the ministerial duty in the first place.[18] For example, in *State ex rel. Agricultural Extension Service v. Miller*,[19] we found a ministerial duty to have been created when the state statutes establishing a budget for the county agricultural extension service created a process "different than the method provided by law for the preparation of the general county budget." We noted that the county board had "a general duty and power to coordinate and to reduce, alter, or amend the county budget," but that the statute at issue in that case had the "obvious intent" to specify funding and "not vest it in the county board under its general budget-making powers."[20] In other words, the duty of the county board in *Miller* was ministerial precisely *because* it had been removed from the normal budgeting process. The ordinance at issue in this case, by contrast, expressly incorporates the normal budgeting process—and therefore is subject to the discretion that is inherently part of that process.

And the Relators' petition necessarily implicates judicial involvement in the city's budgeting process. The Relators petitioned the court to issue a writ "commanding" the city council to comply with § 25-9 "by immediately appropriating funding for the office of the . . . Auditor, and to employ and appropriate

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[18] See, e.g., *State ex rel. Ledbetter v. Duncan*, 702 S.W.2d 163 (Tenn. 1985); *Sturgis v. County of Allegan*, 343 Mich. 209, 72 N.W.2d 56 (1955); *Foster v. Taylor et al.*, 210 S.C. 324, 42 S.E.2d 531 (1947); *People ex rel. O'Loughlin v. Prendergast*, 219 N.Y. 377, 114 N.E. 860 (1916); *Metro. Dist. Com'n v. City of Cambridge*, 12 Mass. App. 921, 424 N.E.2d 272 (1981); *State ex rel. Hall v. Bauman*, 466 S.W.2d 177 (Mo. App. 1971); *Lohr v. Sullenberger*, No. CL 03 000001 00, 2003 WL 1923790 (Va. Cir. Apr. 8, 2003).

[19] *State ex rel. Agricultural Extension Service v. Miller*, 182 Neb. 285, 287, 154 N.W.2d 469, 471 (1967).

[20] *Id.* at 288, 154 N.W.2d at 471.

funding for the . . . Auditor so long as required by law, or be held in contempt by this Court." The court could not enforce such a writ unless it was willing to determine, not only whether funding has been appropriated for an Auditor, but whether that funding is sufficient to support the office. This is not a case in which the respondent's legal duty was clearly articulated—for example, filling a vacancy in an office created by state law,[21] or abiding by merit selection or civil service rules.[22] The duty at issue in this case requires the exercise of discretion that cannot be commanded by a court.

In this mandamus action, the Relators bear the burden of demonstrating clearly and conclusively that they are entitled to the particular thing they want—the funding and appointment of the Auditor—and that the city council is legally obligated to act.[23] The Relators have failed to carry their burden of demonstrating that § 25-9 imposes a clear legal duty on the city council to employ and appropriate funding for an Auditor. Because the Relators have not demonstrated that they had a clear right to the relief they sought, we conclude that the district court did not err in denying the Relators their requested writ of mandamus.

The Relators' final assignment of error is that the district court erred in admitting certain evidence because it was irrelevant. Specifically, the Relators contend that the following evidence should not have been admitted: a portion of the Omaha City Charter dealing with the budget and finance, a copy of Omaha's 2008 budget and resolutions approving the budget, an affidavit of the Omaha city clerk, an affidavit of the Omaha personnel finance director, and the testimony of the staff assistant to the Omaha City Council. Essentially, the Relators

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[21] See, *Dieringer v. Bachman*, 131 W. Va. 562, 48 S.E.2d 420 (1948); *McMullen v. City Manager*, 300 Mich. 166, 1 N.W.2d 494 (1942); *Board of Commissioners v. Montgomery*, 170 Ga. 361, 153 S.E. 34 (1930); *State ex rel. Maes v. Wehmeyer*, 324 Mo. 933, 25 S.W.2d 456 (1930); *State ex rel. Hartman v. Thompson*, 627 So. 2d 966 (Ala. Civ. App. 1993).

[22] See, *Blair v. Coey*, 113 Ohio App. 3d 325, 680 N.E.2d 1074 (1996); *Irmscher v. McCue*, 504 N.E.2d 1034 (Ind. App. 1987).

[23] See *Woodman, supra* note 11.

argue that because the foregoing evidence is unnecessary in interpreting § 25-9, it was error for the court to admit and rely on it.

[13] But as noted above, interpretation of a municipal ordinance is a question of law, on which we reach an independent, correct conclusion irrespective of the determination made by the court below.[24] We need not determine whether the district court inappropriately relied on evidence in interpreting § 25-9, because even if it did, such error was harmless—our independent analysis of § 25-9 cures any such error.[25]

CONCLUSION

The Relators were not entitled to the writ of mandamus ordering the city council to appoint and fund an Auditor. Therefore, we affirm the order of the district court.

AFFIRMED.

MILLER-LERMAN, J., participating on briefs.

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[24] See *Brunken, supra* note 6.

[25] See *Alsobrook v. Jim Earp Chrysler-Plymouth*, 274 Neb. 374, 740 N.W.2d 785 (2007).

MATTHEW WILSON AND LINDA WILSON, APPELLANTS, V. SEMLING-MENKE COMPANY, INC., APPELLEE.

766 N.W.2d 128

Filed June 12, 2009. No. S-08-985.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded.

Brian J. Adams, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

V. Gene Summerlin, of Ogborn, Summerlin & Ogborn, P.C., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Matthew Wilson and Linda Wilson appeal the decision of the Otoe County District Court to grant a directed verdict on one of their two claims against Semling-Menke Company, Inc. (SEMCO). The Wilsons filed a breach of warranty claim for their allegedly defective windows under the Nebraska Uniform Commercial Code (U.C.C.), Neb. U.C.C. § 2-313 (Reissue 2001), and a breach of written warranty claim under the federal Magnuson-Moss Warranty Act (the MMWA), 15 U.S.C. §§ 2301 to 2312 (2006). SEMCO, the manufacturer, had refused to replace or repair the windows after the Wilsons claimed the windows leaked, causing damage to their home. At the close of the Wilsons' case in chief, SEMCO moved for a directed verdict on both claims.

The district court granted SEMCO a directed verdict for the breach of written warranty claim under the MMWA, finding that the windows were not "consumer products" as required to establish a prima facie claim. The jury found for the Wilsons on the U.C.C. claim and awarded damages. The Wilsons now appeal, arguing the district court's decision to grant a directed verdict on the MMWA claim was in error. We reverse the decision of the district court and remand the cause for proceedings consistent with this opinion.

FACTS

Matthew and Linda purchased a vacant lot and built a house in Otoe County, Nebraska, beginning in 1998. At the time, the Wilsons owned and operated Genesis Homes, a corporation in the business of building houses. Linda was the general contractor for homes built by Genesis Homes, which position involved planning and overseeing the construction process as a whole. The Wilsons purchased the lot for the purpose of building their own home, and they acted as general contractors. The Wilsons took out the construction loan in their own names. Genesis Homes did not contribute funds.

The windows in question were purchased at ABC Supply Company (ABC) early in 2000, and Linda was assisted by Jay Small in choosing the windows. Linda had previously purchased supplies from ABC and had been assisted by Small in the past in her capacity as general contractor for Genesis Homes. The Wilsons eventually purchased 22 SEMCO windows for installation in their new home.

At trial, Linda testified that she and Matthew were specifically looking for sturdy windows able to withstand high winds. Linda communicated this desire to Small, as well as the fact that the windows were for a private dwelling and not for a home she was building for someone else. Small recommended SEMCO windows. Linda had never heard of SEMCO windows before that time. According to Linda, Small stated that he had received training at the SEMCO factory and that SEMCO windows were built to withstand high winds. Linda testified that the reported ability of SEMCO windows to withstand high winds, as well as the written warranty, influenced her decision to purchase the windows.

In his deposition, Small testified that ABC supplies contractors and is a wholesale service, although ABC occasionally makes retail sales. Small also testified that he had previously dealt with Linda as a representative of Genesis Homes. Small stated he was aware that the sale of the SEMCO windows at issue in this case was for Linda's private home. Small also received a commission for the sale, which was apparently not typical for a retail sale. At ABC, retail products are sold at a 15- to 30-percent markup from wholesale goods. The Wilsons did not pay retail price.

The invoice in the record lists Genesis Homes as the purchaser, although Linda testified at trial that Genesis Homes did not purchase the windows and that she and Matthew purchased the windows out of their own funds. Linda testified that Genesis Homes had an account at ABC for several years before purchasing the windows and that she did not have an account at ABC in her own name. Linda stated that prior to building their private residence, she had rarely used the account at ABC to purchase anything for personal use. Linda testified that she had experienced a delay in receiving and installing the windows

because of defects discovered by ABC. Linda also testified that after installation, the windows leaked water and air, but the Wilsons did not identify the windows as being the source of the problem until 2003.

According to the Wilsons, the bulk of the damage took place during a storm on May 22, 2004. Linda testified that water had soaked through the carpeting in many areas of the house and that there were no holes in the house and no broken windows. Linda testified that she had seen water drip through the windows and that they had cleaned up as best they could the night of the storm. In addition to water on the carpet, drywall and insulation had to be replaced or repaired.

The Wilsons contacted SEMCO after the storm, and 4 to 6 weeks later, SEMCO sent a representative to their home. There was conflicting evidence at trial as to what the Wilsons told the representative about when the windows began to leak, but SEMCO never repaired or replaced the windows.

At the close of the Wilsons' case in chief, SEMCO made a motion for a directed verdict as to both counts. The district court denied the motion as to the U.C.C. claim, but granted the motion as to the federal claim. The district court found that as a matter of law, the windows were not "consumer products" as required for recovery under the MMWA. The jury found for the Wilsons on the U.C.C. claim and awarded damages in the amount of $27,246.35. The sole issue before this court is whether the windows were "consumer products" as required under the MMWA.

ASSIGNMENT OF ERROR

The Wilsons claim the district court erred when it found that the windows were not consumer products as a matter of law.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[1]

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[1] *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

ANALYSIS

The MMWA provides a remedy for consumers who have suffered damages from a defective product when that product was covered by a written warranty. The purpose of the MMWA was "(1) to make warranties on consumer products more readily understood and enforceable and (2) to provide the Federal Trade Commission (FTC) with means of better protecting consumers."[2] Under § 2304 of the MMWA, a warrantor must, at the least, remedy a defective product in a reasonable amount of time, and if it cannot be repaired, the consumer may elect either replacement or a refund. If the warrantor fails to repair the product in a reasonable amount of time, then the consumer may recover incidental expenses associated with that failure. And under § 2310 of the MMWA, a consumer may recover damages and attorney fees if he or she prevails in a civil suit.

In order for the MMWA to apply, the purchaser must be a "consumer" of a "consumer product" as those terms are defined under the MMWA. Section 2301(1) defines "consumer product" as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." Section 2301(3) defines "consumer" as

> a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

In this case, the district court found that the windows sold by SEMCO to the Wilsons were not consumer products as

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[2] *Illinois ex rel. Mota v. Central Sprinkler Corp.*, 174 F. Supp. 2d 824, 827 (C.D. Ill. 2001).

defined under the MMWA. Relying in part on the Federal Trade Commission regulations explaining consumer products, the district court found the MMWA inapplicable. The pertinent Federal Trade Commission regulation, 16 C.F.R. § 700.1 (2009), further defines the products covered by the MMWA:

> (a) The [MMWA] applies to written warranties on tangible personal property which is normally used for personal, family, or household purposes. This definition includes property which is intended to be attached to or installed in any real property without regard to whether it is so attached or installed. This means that a product is a "consumer product" if the use of that type of product is not uncommon. . . . *Where it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage.*
>
> . . . .
>
> (e) The coverage of building materials which are not separate items of equipment is based on the nature of the purchase transaction. An analysis of the transaction will determine whether the goods are real or personal property. The numerous products which go into the construction of a consumer dwelling are all consumer products when sold "over the counter," as by hardware and building supply retailers. . . . However, where such products are at the time of sale integrated into the structure of a dwelling they are not consumer products as they cannot be practically distinguished from realty. *Thus, for example, the beams, wallboard, wiring, plumbing, windows, roofing, and other structural components of a dwelling are not consumer products when they are sold as part of real estate covered by a written warranty.*
>
> (f) In the case where a consumer contracts with a builder to construct a home, a substantial addition to a home, or other realty (such as a garage or an in-ground swimming pool) the building materials to be used are not consumer products. Although the materials are separately identifiable at the time the contract is made, it is the intention of the parties to contract for the construction of

> realty which will integrate the component materials. Of course, as noted above, any separate items of equipment to be attached to such realty are consumer products under the [MMWA].

(Emphasis supplied.)

The Wilsons point to the language in 16 C.F.R. § 700.1(a), which states that "any ambiguity will be resolved in favor of coverage." They point out that Linda purchased the windows for a personal residence to be built using the Wilsons' private funds. Although Linda used Genesis Homes' account at ABC to purchase the windows in question, that was the extent to which Genesis Homes was involved.

SEMCO, in turn, argues that the Wilsons purchased the windows at wholesale price, utilizing Genesis Homes' account with ABC, and further contends that other courts have reached similar decisions. The case relied upon by the district court in reaching this decision, *Illinois ex rel. Mota v. Central Sprinkler Corp.*,[3] is readily distinguishable. In that case, the State of Illinois bought indoor sprinkler systems specifically designed to be used in institutional settings, such as mental institutions or correctional facilities. The court found that the sprinklers could not be considered a "consumer product."

The court in *Central Sprinkler Corp.* made the point that the sprinklers "[could not] be bought by consumers 'over the counter' and [were] not built into consumer dwellings or homes, but rather into commercial or industrial buildings."[4] Under the right circumstances, SEMCO windows could be considered to be consumer products under that standard, because they could be purchased in a sale "over the counter" and are designed to be used in consumer dwellings and homes.

Weiss v. MI Home Products, Inc.[5] is cited by SEMCO as being dispositive. In that case, the windows were installed during construction and plaintiffs purchased the finished townhome. After discovering that the windows were defective,

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[3] *Central Sprinkler Corp., supra* note 2.

[4] *Id.* at 831-32.

[5] *Weiss v. MI Home Products, Inc.*, 376 Ill. App. 3d 1001, 877 N.E.2d 442, 315 Ill. Dec. 690 (2007).

plaintiffs attempted to recover under the MMWA, claiming the windows were "consumer products." The court classified the issue as "whether the windows installed in the new construction of a home are a 'consumer product' as defined by the MMWA."[6] The court went on to state:

> It appears that as to products that become a part of realty, the distinction drawn is whether the product is being added to an already existing structure or whether it is being utilized to create the structure. The windows here were installed to create the structure. We conclude that the windows at issue here are not a consumer product.[7]

The Wilsons argue that *Weiss* is inapplicable because plaintiffs in *Weiss* purchased the finished townhome, whereas the Wilsons purchased the windows separately. And, as already mentioned, 16 C.F.R. § 700.1(e) indicates that building materials sold in an over-the-counter retail sale will be considered "consumer products," even if they are eventually integrated into a finished building, and that it is the nature of the sale that must be analyzed. Furthermore, 16 C.F.R. § 700.1(f) appears to contemplate a contract between a buyer and a builder, which was present in *Weiss*, but no contract was present in this case.

Although there is some ambiguity as to whether the windows can be considered "consumer products," 16 C.F.R. § 700.1(a) clearly states that "[w]here it is unclear whether a particular product is covered under the definition of consumer product, any ambiguity will be resolved in favor of coverage." Under these circumstances, the purchase of the windows resembled a purchase "over the counter" more than it resembled a purchase by a contractor, as is required under 16 C.F.R. § 700.1(e) for building materials to be considered "consumer products."

Linda clearly expressed her intent to use the windows in the Wilsons' private residence, and the salesperson at ABC testified he was aware of Linda's intention. Linda used the Wilsons' own funds to pay for the windows, rather than using funds from the Genesis Homes' account. The Wilsons relied on the

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[6] *Id.* at 1003, 877 N.E.2d at 444, 315 Ill. Dec. at 692.

[7] *Id.* at 1005, 877 N.E.2d at 445, 315 Ill. Dec. at 693.

existence of a written warranty when purchasing the windows. They did not have a contract with a builder for the house as a whole, but instead purchased the windows separately. We find that under these circumstances, the windows purchased by the Wilsons were "consumer products" as a matter of law.

CONCLUSION

The purpose of the MMWA is to protect consumers and to give consumers a remedy for enforcing written warranties. We find that under these facts, the Wilsons were consumers who purchased the windows as consumer products in a sale "over the counter" as defined by the MMWA. We therefore reverse the district court's order granting a directed verdict to SEMCO on the Wilsons' claim under the MMWA. We remand the cause to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EDWARD POINDEXTER, APPELLANT.
766 N.W.2d 391

Filed June 19, 2009. No. S-07-1075.

1. **Postconviction.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Time: Appeal and Error.** Failure to timely appeal from a final order prevents an appellate court's exercise of jurisdiction over the claim disposed of in the order.
5. **Postconviction: Final Orders: Appeal and Error.** An order granting an evidentiary hearing on some issues presented in a postconviction motion but denying a hearing on others is a final order. Such an order affects a substantial right in a special proceeding and is thus final and appealable under Neb. Rev. Stat. § 25-1902 (Reissue 2008).

6. **Postconviction: Final Orders.** An order denying an evidentiary hearing on a postconviction claim is a final judgment as to such claim under Neb. Rev. Stat. § 29-3002 (Reissue 2008).
7. **Actions: Words and Phrases.** A "claim for relief" under Neb. Rev. Stat. § 25-1315 (Reissue 2008) is not synonymous with an "issue" or "theory of recovery," but, rather, is equivalent to a separate "cause of action."
8. **Postconviction.** A postconviction motion presents a single cause of action, and the various facts alleged as evidence that the defendant is entitled to postconviction relief are but multiple theories of recovery.
9. **Postconviction: Evidence.** Issues of credibility are for the postconviction court.
10. **Effectiveness of Counsel: Presumptions: Proof: Appeal and Error.** A defendant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness. There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.
11. **Effectiveness of Counsel.** The ineffectiveness of counsel will not be judged by hindsight.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Robert F. Bartle, of Bartle & Geier, Beth Little Hamilton, and John C. Vanderslice, of the Federal Public Defender's Office, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Amy A. Miller, for amicus curiae American Civil Liberties Union Foundation of Nebraska.

Heavican, C.J., Wright, Connolly, Gerrard, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

I. NATURE OF CASE

Edward Poindexter and David L. Rice were convicted of first degree murder for the death of an Omaha police officer. Poindexter's and Rice's convictions were affirmed on direct appeal.[1] Two petitions for writ of habeas corpus by Poindexter

[1] *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972).

have since been denied.[2] Poindexter now appeals from a denial of his motion for postconviction relief. The motion alleged prosecutorial misconduct at trial, ineffective assistance of trial and appellate counsel, and constitutional error stemming from the unitary procedure used at trial. We find no merit to Poindexter's arguments and affirm the judgment.

II. BACKGROUND

1. Trial

Poindexter and Rice were tried in a joint trial before a jury in 1971. The jury considered all of the evidence and determined both guilt and punishment in the same proceeding, in a "unitary trial procedure." The general facts presented at Poindexter's trial were as follows:

On August 17, 1970, a caller to the 911 emergency dispatch service reported hearing a woman or girl screaming for help from a vacant house in Omaha, Nebraska. Several officers, including Officer Larry D. Minard, Sr., responded to the call and entered the house. When Minard inspected a suitcase lying on its side near the doorway, an explosion occurred, killing Minard and injuring other officers in the house.

The suitcase contained a bomb of ammonia dynamite that had been set to explode when moved. The bomb also contained copper wires, pieces of which were apparently blown next door by the force of the explosion.

Duane Peak, age 16 at the time of trial, testified that the bombing was part of a scheme devised by Poindexter and Rice. Peak, Rice, and Poindexter were all members of the National Committee to Combat Fascism (NCCF), an affiliate of the Black Panther party. Poindexter was the head of the NCCF, and Rice was the "Deputy Minister of Information" for the NCCF.

Peak testified that Poindexter and Rice assembled the bomb at Rice's home and that he was operating under their instructions when he planted the suitcase and made the false report to the 911 dispatch. Peak testified that during the call, he made his voice sound deeper than normal.

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[2] *Poindexter v. Wolff*, 403 F. Supp. 723 (D. Neb. 1975); *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

During cross-examination, Peak was questioned about the fact that his original confession did not implicate Poindexter or Rice and about inconsistencies in his account of events. Peak denied having struck any deal with the prosecution in exchange for his testimony, but he did state that he felt things would go easier for him if he cooperated. Sometime after Poindexter and Rice's trial, Peak pleaded guilty to charges in juvenile court.

No issue was presented to the jury as to whether it had been Peak who made the 911 call, and the tape recording of the call was not entered into evidence. Defense counsel, instead of disputing that Peak was involved with the crime, generally denied that Poindexter and Rice had in any way joined the scheme.

The State presented evidence physically tying Poindexter and Rice to the crime, although the probative value of the evidence was questioned by defense counsel. Expert testimony demonstrated that metal particles found on a pair of long-nosed pliers seized from Rice's house generally matched copper wire found blown next door from the explosion. Other testimony established that toolmarks found on the copper wire matched the pliers found in Rice's basement. Sticks of ammonia dynamite were found in Rice's basement. Ammonia dynamite residue was found in Poindexter's jacket pocket the day he was arrested.

Several NCCF newsletter articles were admitted into evidence over objection from defense counsel. These articles were mostly written by either Poindexter or Rice for the NCCF newsletter and were generally derogatory toward police officers. Many advocated violence against the police force.

The jury found Poindexter and Rice guilty of first degree murder and sentenced them to life imprisonment.

2. Direct Appeal and Habeas

Poindexter was represented at trial and on direct appeal by lawyers from the same public defender's office. His conviction was affirmed on direct appeal.[3] Poindexter did not challenge the unitary trial procedure, nor did he raise prosecutorial misconduct on direct appeal.

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[3] *State v. Rice*, *supra* note 1.

Among the errors he did assign was the admission into evidence of the NCCF newsletter articles. We held that most of the newsletters, containing expressions of hatred for the Omaha police and advocating the use of violence against them, were properly admitted to show intent, malice, or motive. We concluded that the trial court erred in admitting three of the articles, but we concluded that their admission was not prejudicial. We reasoned that the properly admitted articles were "far more virulent,"[4] that there were relevant cautionary instructions, and that the other properly admitted evidence against Poindexter was relatively strong.

After his direct appeal, Poindexter petitioned for a federal writ of habeas corpus, which was denied after an evidentiary hearing.[5] Among other things, Poindexter's habeas action asserted constitutional error stemming from the newsletter articles, the unitary trial procedure, and the allegedly coerced or perjured testimony of Peak.

The U.S. District Court rejected the idea that the admission of any of the newsletter articles was so prejudicial as to amount to a denial of due process. It also rejected any claim that there was constitutional error stemming from jointly trying Poindexter and Rice.

And the court concluded that there was no evidence of any physical mistreatment or unduly preferential treatment of Peak that would lead to the conclusion that his testimony was unconstitutionally coerced or otherwise inadmissible.[6] The court recognized that Peak was originally unwilling to testify against Poindexter and Rice in the preliminary hearing and that he came back after a break visibly nervous and finally willing to implicate Poindexter and Rice. The court also observed that the police had "undoubtedly" mentioned the possibility of the death penalty to Peak and that the police had generally treated Peak very well prior to trial.[7] But these facts did not show

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[4] *Id.* at 751, 199 N.W.2d at 494.

[5] *Poindexter v. Wolff*, *supra* note 2.

[6] See *id.*

[7] *Id.* at 733.

coercion. They were known to defense counsel and instead pertained to Peak's credibility.

In 2006, Poindexter petitioned for a writ of habeas corpus in state court, pertaining to matters not relevant to this appeal. The writ was denied.[8]

3. Postconviction

(a) Procedural History of Unitary Trial Claim

Poindexter's motion for postconviction relief was filed in 2003. In his original motion, Poindexter raised three basic claims: (1) ineffective assistance of counsel regarding counsel's alleged failure to properly investigate, present exculpatory facts, and cross-examine various witnesses; (2) infringement upon Poindexter's right to a fair and impartial jury, because the jury was instructed to determine Poindexter's guilt and sentence in a unitary proceeding; and (3) prosecutorial misconduct at trial. Central to Poindexter's allegations of prosecutorial misconduct was his claim that the State had concealed the tape recording of the 911 call and that the recording allegedly revealed that it was not Peak who made the call.

In November 2003, the postconviction court denied relief without an evidentiary hearing on Poindexter's allegations concerning the unitary trial proceeding. The postconviction court reasoned that the issue was procedurally barred, because it was known to trial counsel and could have been raised on direct appeal. The court granted Poindexter an evidentiary hearing on the ineffective assistance and prosecutorial misconduct claims.

No appeal was taken from the November 2003 order. Instead, Poindexter filed an amended postconviction motion seeking review of the unitary trial under ineffective assistance and plain error arguments. In July 2005, the court issued an order denying an evidentiary hearing on either of these new characterizations of the unitary trial procedure issue and dismissed these claims. The court explained that the unitary trial procedure of which Poindexter complained had been in effect for 59 years

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[8] *Poindexter v. Houston*, *supra* note 2.

at the time of his trial and that it was not until 1973 that the Nebraska Legislature began to mandate bifurcated proceedings. Poindexter did not appeal from the July 2005 order.

Almost a year later, in June 2006, Poindexter asked the court to reconsider its dismissal of the claims relating to the unitary trial proceedings. The court denied Poindexter's motion for reconsideration, because it was not filed in the same term as the order Poindexter sought to revisit. The court alternatively stated that the merits were properly disposed of in the July 2005 order and that there was no reason to reconsider them. Poindexter did not appeal from the June 2006 denial of his motion to reconsider.

Poindexter filed a second amended petition for postconviction relief after having been granted permission to amend his allegations of ineffective assistance to include the alleged failure to request a copy of the 911 tape. The second amended petition is the operative pleading for this appeal.

As relevant to this appeal, Poindexter alleged that trial counsel was ineffective in failing to (1) effectively cross-examine witnesses Peak, Sgt. Jack Swanson, and Sgt. Robert Pfeffer, (2) inquire into missing police reports of Peak's interrogations, (3) offer evidence to discredit the State's expert testimony identifying dynamite particles on Poindexter's clothing and copper on pliers, and (4) investigate and present evidence concerning the 911 tape recording. He alleged that appellate counsel was ineffective for failing to raise any of the alleged deficiencies of trial counsel.

Poindexter next alleged prosecutorial misconduct in (1) failing to disclose the existence of the 911 tape recording and (2) failing to disclose promises of leniency or threats of prosecution made to Peak in return for his testimony.

Poindexter also continued to allege that his right to a fair and impartial jury was violated by virtue of the unitary trial procedure and that his right to effective assistance of counsel was violated when counsel failed to request a bifurcated trial or argue this issue as plain error on appeal. The court did not, however, reconsider its prior rulings regarding the unitary trial procedure, noting that those allegations had been dismissed by written order in July 2005.

(b) Evidence Presented at Postconviction Hearing

The court considered the record of the original trial, along with the record of Rice's postconviction proceedings, introduced into evidence at Poindexter's evidentiary hearing. Rice had raised allegations concerning the 911 tape and promises or threats to Peak, similar to Poindexter's.[9] We held that Rice had failed to prove those claims. But Poindexter submitted further depositions and testimony in the hope that he would be successful where Rice had not. Poindexter particularly relied on the fact that, unlike Rice, he was able to obtain a voice exemplar from Peak and an expert opinion that the voice on the 911 tape did not belong to Peak.

(i) 911 Tape

It was undisputed that a copy of the 911 tape had resurfaced by 1980, but the parties disputed whether Poindexter's counsel had been aware of the tape recording prior to trial. Poindexter asserted that the State had failed to disclose the tape.

The depositions of coprosecutor Samuel W. Cooper were admitted into evidence. Cooper testified that defense counsel was aware of a 911 tape before trial and that the tape had always been available to defense counsel if they wanted to examine or copy it. Cooper had testified at Rice's hearing that he played the tape for both defense counsel prior to trial.

Cooper testified that there was no reason for anyone to question that it was Peak's voice on the tape. Peak admitted that he had made the call. In addition, although Peak testified that he tried to disguise his voice when he made the call, several witnesses who knew Peak well, including Peak's brother and grandfather, had positively identified Peak's voice on the tape. No one ever came forward asserting that it was not Peak's voice. Cooper stated that Poindexter's counsel was well aware of the witnesses' identifications of Peak's voice.

Thomas Kenney and Frank Morrison were the public defenders representing Poindexter. Both Kenney and Morrison were deceased by the time of Poindexter's postconviction evidentiary hearing. During Kenney's opening statement at Poindexter's

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[9] See *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983).

trial, Kenney had referred to the fact that "the police have a Voicegram; in other words, every call that is placed to the emergency number at the police station is recorded." It is unclear what Kenney meant by a "Voicegram," and when Poindexter deposed Kenney in 2004, he did not ask him any questions about his knowledge of a 911 tape.

Poindexter testified that he had no knowledge of the tape until he saw a documentary in the 1990's making reference to it. Poindexter deposed Morrison in 2003, when Morrison was 98 years old. Morrison testified that he did not think he had been aware of a 911 tape recording during the time of Poindexter's trial. Cocounsel for Rice, David Herzog, testified at the postconviction hearing that he was sure he had never been made aware of the existence of a 911 tape. And Herzog believed that a "Voicegram" referred simply to a time and date stamp for the 911 call.

Poindexter introduced a copy of internal Federal Bureau of Investigation (FBI) communications indicating that the Omaha police had originally asked the FBI to conduct a voice analysis of the taped 911 call; Poindexter was apparently attempting to show that the prosecution knew the tape was exculpatory. The request for the analysis had been made on the day of the murder and reflects that a copy of the tape was sent to the FBI at that time. The letter demonstrates that the plan was for the FBI to conduct an analysis of the tape and then compare it to tape recordings of suspects. The FBI informed the police that the analysis would be "strictly informal," "for lead purposes only," and that "the FBI could not provide any testimony in the matter." A later communication submitted into evidence by Poindexter reads in part:

> Assistant [chief of police] GLENN GATES, Omaha PD, advised that he feels that any use of tapes of this call might be prejudicial to the police murder trial against two accomplices of PEAK and, therefore, has advised that he wishes no use of this tape until after the murder trials . . . has [sic] been completed.

Cooper explained the context of the correspondence with the FBI. He testified that at the time of Poindexter's trial, voice print analysis was in its infancy and was not considered

admissible in court. For that reason, any analysis would be for lead purposes only. Cooper explained that the request for a voice analysis was withdrawn as soon as it became clear that there was no real issue as to whose voice was on the tape. Cooper specifically denied that the request for a voice analysis was withdrawn for fear that it was not Peak who made the call. Cooper explained that once Peak was arrested and he and other witnesses said he made the call, there was no genuine argument that it was not Peak's voice on the tape. As such, the prosecution did not see any benefit in opening the door to a battle of experts and withdrew the request for a voice analysis from the FBI.

Lt. James Perry, the head of the investigation for the Minard slaying, testified in a 1980 deposition that he was unaware of any request to have the tape tested but that he recalled discussion of the possibility before the police department knew who had made the call. Perry testified that once Peak admitted to making the 911 call, the department considered the tape of that call a relatively worthless piece of evidence.

Poindexter attempted to show that the tape was not so worthless. Poindexter located Peak and obtained a voice exemplar as part of the discovery process in his postconviction proceeding. He then employed Thomas Owen, a forensic consultant, to conduct a comparative voice analysis of the tape. Although the original 911 tape had been destroyed, Owen used a copy of the original. The postconviction court had allowed the copy into evidence, but noted that it was uncertain at what time and with what equipment the copy was made, whether it was in the same condition as when it was made, and whether the equipment from which it was made was capable of reproducing an accurate voice tone or quality. These facts, the court explained, bore on the relevance and probative value of the tape, but not its authenticity and admissibility.

Based on the examination of a digital spectrogram, Owen opined that it was "highly probable within a reasonable degree of scientific certainty" that the voice on the tape was not Peak's. Digital spectrograms were not available at the time of Poindexter's trial. Nevertheless, Owen explained that the analog spectrogram that would have been available in 1971

had the same information as the digital spectrogram, only without the clarity and ability to qualify and quantify various numbers related to the placement of the formats on them. Both methods, according to Owen, show a visual comparison of the spectrograms, and under both methods, an examiner listens to the tapes and notes pitch, quality of speech, rate of speech, amplitude, and syllable coupling. Owen also opined that the 911 caller did not disguise his voice when he made the call. Poindexter and Herzog both testified they were familiar with Peak's voice and that the voice on the 911 tape was not Peak's. The State did not employ expert analysis of the tape.

(ii) Leniency or Threats to Peak

Donald Knowles, the county attorney at the time of Poindexter's trial, testified at Rice's postconviction hearing that Peak was still under the charge of first degree murder at the time of Poindexter's trial. Knowles testified that while Peak's attorney may have "broached the subject" of the possibility of a plea in juvenile proceedings prior to his testimony in Poindexter's trial, Knowles made "no commitment" and "didn't really comment on it, no discussions as such back and forth." Knowles stated that to his knowledge, neither he nor anyone else made any promises to Peak concerning the ultimate charges against him. Knowles testified that a plea bargain was never struck and that the decision to prosecute Peak as a juvenile took place sometime after Poindexter's trial.

Knowles was also questioned about the fact that Peak had originally refused to implicate Poindexter at the preliminary hearing. Knowles remembered that the preliminary hearing was in a very small room that was filled with a lot of people. He stated that he did not have any discussions with Peak's attorney during the recess. Knowles said that Peak's attorney might have said something to him at the door of the courtroom, but that he did not recall.

Arthur O'Leary was the special prosecutor working under the direction of Knowles in 1971. O'Leary similarly testified at the Rice hearing that there had been no promises of leniency made to Peak in exchange for his testimony. O'Leary explained that when Peak's attorney had asked him what he

would do for Peak, he replied that he "would do whatever I could to help him if he cooperated with us." O'Leary stated he did not have the authority to enter into a plea bargain agreement and so Peak's attorney "knew better than to ask specifically and I knew better than to answer specifically." O'Leary also stated that a deal would not have been entered into without his knowledge and that, to his knowledge, no deal had been made.

O'Leary generally testified that the county attorney's office and the police fully disclosed any evidence pertaining to the case, including police reports and physical evidence. O'Leary testified: "We never tried to make a game out of a criminal case." Cooper testified that he was privy to all the police reports in the case and that to his knowledge, the State had not struck any deal with Peak prior to trial in exchange for his testimony.

Kenney testified that he and Herzog had suspected a deal and "tried everything we could think of to uncover if there was a deal" between Peak and the prosecution. Kenney testified, however, that the prosecution and Peak always denied that there was a deal and that he was never able to establish that there was one. Kenney noted that "it was no secret" that the police had taken Peak to eat in "a fancy restaurant at the airport" at least one time, allegedly as part of keeping Peak isolated from other prisoners, including Poindexter and Rice.

(iii) Pliers and Dynamite

Poindexter presented expert testimony at the postconviction hearing pertaining to the dynamite residue and the copper found next door in an effort to show that his trial counsel was ineffective in failing to pursue its own expert testimony at trial. Robert Webb, an expert in materials analysis, testified at the postconviction hearing that the testimony presented by the prosecution's experts on these points was very general. In particular, the prosecution's experts identified the dynamite on Poindexter's clothing and the dynamite from the bomb as belonging to the most general category of ammonia dynamite. The experts did not analyze the more specific forms of dynamite and whether those matched.

Morrison testified as to why experts were not employed to refute the prosecution's case. Morrison testified that they suspected someone had planted the dynamite residue in Poindexter's pocket and that they were afraid it might in fact match the more specific subcategory of dynamite. Morrison stated that if "we had done a scientific analysis and prove[d] that it was the same explosive that was used it would've been the nail in Poindexter's coffin."

Kenney elaborated that they were well aware that the prosecution's testimony regarding the dynamite match was very general. The cross-examination of the State's witnesses reflects this. Kenney noted he was more concerned at that time with the fact that the tool markings on the copper wire matched the pliers found in Rice's basement.

(c) District Court's Order

The court denied Poindexter's motion for postconviction relief. The court found that Poindexter had failed to prove the existence of any deal between the prosecution and Peak in exchange for Peak's testimony. As for the 911 tape, the district court concluded that Poindexter's counsel knew of the tape and did not specifically request a copy of the tape and that the tape was not considered exculpatory evidence. The court also noted that Poindexter had failed to show that Owen's opinion, had it been presented at the 1971 trial, would have changed the result. The court found that trial counsel were not ineffective in their investigation or their cross-examination of Peak or the State's experts. As a necessary result of these findings, the court concluded that appellate counsel was not ineffective for failing to raise these issues on direct appeal.

III. ASSIGNMENTS OF ERROR

Poindexter asserts that the district court erred in (1) failing to find that the unitary trial procedure in place in 1971 was "plain structural error"; (2) failing to find that Poindexter's trial and appellate counsel were ineffective in failing to challenge the unitary trial process, failing to present and preserve critical evidence, and failing to effectively rebut prosecutorial evidence; and (3) not giving appropriate weight to significant instances of prosecutorial misconduct.

IV. STANDARD OF REVIEW

[1] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[10]

[2] On appeal from a proceeding for postconviction relief, the lower court's findings of fact will be upheld unless such findings are clearly erroneous.[11]

V. ANALYSIS

1. Unitary Trial Procedure and Newsletter Articles

We first address Poindexter's assignments of error pertaining to the unitary trial procedure. Poindexter asserts that the unitary trial caused the jury to be exposed to inflammatory newsletter articles that should have been appropriate only for sentencing. Although we specifically determined on direct appeal that there was no prejudicial error derived from the admission of the newsletters, Poindexter believes this holding is no longer valid when considered in the context of a unitary trial challenge and the newly discovered evidence pertaining to the 911 tape. Poindexter also argues that the unitary trial procedure forced trial counsel into a conflict by having to argue innocence and mercy for sentencing at the same time. Poindexter asserts that although counsel did not preserve the alleged error at trial or on appeal, we should recognize it now as plain error. Alternatively, Poindexter alleges ineffective assistance of counsel in failing to object to the unitary trial procedure during trial or on appeal.

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[12] It is clear that we have no jurisdiction over any of Poindexter's unitary trial claims. Poindexter failed to appeal from the postconviction court's determination in November 2003 that Poindexter's unitary trial claims were procedurally barred. Poindexter again failed to appeal from the postconviction court's determination in July 2005 that Poindexter's plain error and ineffective assistance

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[10] *State v. Sims*, *ante* p. 192, 761 N.W.2d 527 (2009).

[11] *State v. Watkins*, *ante* p. 428, 762 N.W.2d 589 (2009).

[12] *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

characterizations of his unitary trial claim lacked merit. Failure to timely appeal from a final order prevents our exercise of jurisdiction over the claim disposed of in the order.[13]

[5,6] An order granting an evidentiary hearing on some issues presented in a postconviction motion but denying a hearing on others is a final order.[14] Such an order affects a substantial right in a special proceeding and is thus final and appealable under Neb. Rev. Stat. § 25-1902 (Reissue 2008).[15] In addition, an order denying an evidentiary hearing on a postconviction claim is a final judgment as to such claim under Neb. Rev. Stat. § 29-3002 (Reissue 2008).[16]

[7,8] Poindexter asserts that his postconviction motion presented multiple "claim[s] for relief" and that thus, the November 2003 and July 2005 denials of his unitary trial "claim[s] for relief" cannot be final, appealable orders pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008). We have already addressed and rejected this argument in *State v. Harris*.[17] A "claim for relief" under § 25-1315 is not synonymous with an "issue" or "theory of recovery," but, rather, is equivalent to a separate "cause of action."[18] A postconviction motion presents a single cause of action, and the various facts alleged as evidence that the defendant is entitled to postconviction relief are but multiple theories of recovery.[19] We have no jurisdiction over Poindexter's unitary trial theories of recovery, which were disposed of during the postconviction proceedings long before the final judgment currently before us.

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[13] See, e.g., *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989).

[14] See *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004). See, also, *State v. Hudson*, 273 Neb. 42, 727 N.W.2d 219 (2007); *State v. Jackson*, 15 Neb. App. 523, 730 N.W.2d 827 (2007).

[15] See *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[16] *State v. Hudson*, *supra* note 14.

[17] *State v. Harris*, *supra* note 14.

[18] See *id*. See, also, *State v. Hudson*, *supra* note 14; *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001); *Pioneer Chem. Co. v. City of North Platte*, 12 Neb. App. 720, 685 N.W.2d 505 (2004).

[19] See *id*.

2. 911 Tape

We next consider Poindexter's assignments of error regarding the 911 tape. Poindexter argues that it was prosecutorial misconduct for the State to fail to inform him of the 911 tape. Alternatively, Poindexter asserts that it was ineffective assistance of trial counsel to fail to obtain the tape and use it at trial to impeach Peak's testimony that he had made the 911 call.

The district court found that the State did not, deliberately or negligently, withhold the 911 tape from Poindexter. In other words, regardless of whether the tape was exculpatory, requiring the prosecution to disclose the tape, the court concluded that it actually had been disclosed. The district court did not clearly err in making this finding. Cooper testified on at least two separate occasions that Poindexter's counsel was aware of the tape and that Cooper had even played it for them. Knowles generally denied hiding any evidence from defense counsel. Poindexter never questioned his lead counsel on the subject, despite his having made a reference to a "Voicegram" at trial, and cocounsel Morrison's testimony seemed not entirely certain.

[9] While Rice's cocounsel stated emphatically that he was unaware of a 911 tape, his testimony is not directly probative of what Poindexter's counsel knew. More importantly, issues of credibility are for the postconviction court.[20] Because the tape was disclosed, we agree with the district court's conclusion that there was no prosecutorial misconduct concerning the tape, and we need not discuss the district court's alternative reasons for this conclusion.

[10] We also agree with the district court that Poindexter's trial counsel was not ineffective for failing to pursue voice analysis of the tape to prove that Peak was not the caller. A defendant claiming ineffective assistance of counsel must show that counsel's representation fell below an objective standard of reasonableness.[21] There is a strong presumption that counsel

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[20] See, e.g., *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

[21] See *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006).

acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.[22]

[11] The district court specifically found that defense counsel knew that several witnesses had identified the voice on the tape to be Peak's. Given Peak's admission and several witness identifications of his voice on the tape, it was not unreasonable for counsel to assume the voice was Peak's. Moreover, defense counsel's strategy was not to exculpate Peak as the 911 caller and thus argue that Peak had falsely admitted to leading an officer to his death in an effort to save himself or others from conviction of a more serious crime. Instead, the defense theory appeared to be that Peak did not act alone, but that Poindexter and Rice were not the ones who helped him. Even assuming that Owen's opinion is correct and that the technology available in 1971 could have produced a similar result, that information does not make Poindexter's trial counsel ineffective for failing to pursue such an analysis. This is especially true when, as the State points out, expert voice identification evidence was generally considered inadmissible at the time of Poindexter's trial.[23] The ineffectiveness of counsel will not be judged by hindsight.[24]

3. Missing Interrogations and Promises of Leniency

Similar to his allegations regarding the 911 tape, Poindexter alleged the State failed to disclose certain interrogations of Peak and an arrangement that had been made in exchange for

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[22] See *State v. Rhodes*, *ante* p. 316, 761 N.W.2d 907 (2009).

[23] See, *United States v. McDaniel*, 538 F.2d 408 (D.C. Cir. 1976); *State v. Gortarez*, 141 Ariz. 254, 686 P.2d 1224 (1984); *People v. Kelly*, 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (superseded by statute as stated in *People v. Wilkinson*, 33 Cal. 4th 821, 94 P.3d 551, 16 Cal. Rptr. 3d 420 (2004)); *Cornett v. State*, 450 N.E.2d 498 (Ind. 1983); *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978); *People v Tobey*, 401 Mich. 141, 257 N.W.2d 537 (1977); *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977); *State v. Free*, 493 So. 2d 781 (La. App. 1986); *People v. Collins*, 94 Misc. 2d 704, 405 N.Y.S.2d 365 (1978). See, also, Sharon E. Gregory, *Voice Spectrography Evidence: Approaches to Admissibility*, 20 U. Rich. L. Rev. 357 (1986).

[24] *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992).

Peak's testimony. Alternatively, Poindexter alleged that trial counsel was ineffective in failing to adequately investigate these matters. The district court found that Poindexter failed to prove that any undisclosed interrogations actually took place or that any undisclosed deal was struck. We agree with the district court's conclusions.

Poindexter's evidence on this subject consists almost entirely of inferences he makes upon the trial record. Poindexter infers that undisclosed interrogations must have taken place, because Peak changed his story between his August 28 and 31, 1970, interrogations. He also claims that Peak made reference during the preliminary hearing to his being interrogated at times not reflected by the police reports turned over to the defense, although Poindexter admits that Peak's testimony was "somewhat confusing."[25] Poindexter infers that a plea bargain agreement was entered into before trial, because Peak received special treatment while in custody and ultimately ended up serving a lenient sentence as a juvenile. Poindexter also infers such an agreement from Peak's behavior at the preliminary hearing.

With regard to the preliminary hearing, Peak admitted that he had "a conversation" with his attorney that indicated that he "didn't have a chance." But he specifically denied having a conversation with the prosecution. When asked to explain what he was afraid of, Peak stated that twice during his original interrogations with police officers, they had mentioned the electric chair. Specifically, the officers had told him he "was sitting in the electric chair so [he] had better tell the truth."

Any new evidence presented at the postconviction evidentiary hearing on whether a deal was struck or coerced was unfavorable to Poindexter's claim. Knowles, O'Leary, and Cooper all testified that there were no promises of leniency in exchange for Peak's testimony and that there was no agreement whatsoever. As for threats, O'Leary specifically denied ever threatening anyone with the electric chair.

Because Poindexter failed to prove the alleged agreement took place, the postconviction court properly concluded that no

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[25] Brief for appellant at 42.

prosecutorial misconduct or ineffective assistance of counsel claims arose from the failure to disclose or to investigate it.

4. Pliers Markings and Dynamite Residue

Poindexter challenges the postconviction court's determination that trial counsel was not ineffective in failing to present expert testimony challenging the State's evidence of dynamite found in Poindexter's pocket and copper remnants found in pliers found in Rice's home.

At trial, the prosecution's expert, Kenneth Snow, testified that the particles found in Poindexter's jacket pocket were ammonia dynamite, the same general type of dynamite as used in the bomb. Expert testimony was also presented that copper residue in pliers found in Rice's basement was of the same general composition as the copper wire found in the basement of an abandoned house next door to the bombing. At the postconviction hearing, Webb, the materials analysis expert for Poindexter, testified that the expert testimony as to the matching dynamite residue and the copper was very general. Webb noted particularly that there were scientific methods available at that time that could have identified what subcategory the ammonia dynamite belonged to.

The record supports the district court's conclusions that the failure to retain independent expert witnesses was a matter of trial strategy and that defense counsel were not deficient in their performance. Not only could further investigation have produced an unfavorable result, as was explained by Morrison, but it is clear that expert witnesses were not necessary for Poindexter's defense counsel to illustrate for the jury the inadequacies of the prosecution's expert testimony. The cross-examination of Snow, for instance, spanned 2 days. Defense counsel focused on the fact that dynamite was found only in one pocket of Poindexter's jacket and that not even the "minutest particle" of dynamite was found anywhere else on Poindexter's body or clothing. Even swabs under Poindexter's fingernails found no traces of dynamite.

Most of the cross-examination focused on illustrating for the jury how general the "matches" really were. Counsel questioned Snow about how broad a category "ammonia dynamite"

was, and Snow admitted that ammonia dynamite was the most common type of dynamite available to the general public and best for all-around general use. Snow specifically admitted that it was unknown whether the dynamite residue found in Poindexter's pocket was from the dynamite used for the bomb or from some other ammonia dynamite used for some other purpose. Snow conceded that his analysis did not identify whether the dynamite residue in Poindexter's pocket was the same brand of dynamite used in the bomb.

Snow also conceded that he did not know whether the dynamite residue had been deposited in the pocket recently or several months before. And he admitted he had no idea how the dynamite particles got into Poindexter's pocket. Snow testified that the small amounts of dynamite found in Poindexter's pocket could have been deposited there by a handkerchief, a pencil, or package of cigarettes that had touched ammonia dynamite and contained some residue.

Cross-examination of Snow regarding the copper particles on the pliers was conducted in a similar vein. Snow admitted that copper wire was very common and that his analysis did not show the copper remnants on the pliers were from the same wire used in the bomb. All Snow could say was that the wire used in the bomb was copper wire and that the pliers found in Rice's basement had copper residue on them. Snow admitted that copper was a common element and that there was nothing remarkable to distinguish the copper found on the pliers "from other copper that exists in mankind." Snow further admitted it was reasonably probable that the pliers had been used to cut some other common copper wire found at any electric store.

We agree with the district court's conclusion that Poindexter was not deprived of effective assistance of counsel on this issue.

5. Swanson's and Pfeffer's Testimony

Poindexter alleges that trial counsel was ineffective, because counsel inadequately cross-examined Swanson and Pfeffer about where and how they found the dynamite in Rice's home. The district court found no merit to Poindexter's allegations

in this regard, which the court stated were tied to Poindexter's implied, but unsubstantiated, accusation that the officers had planted the dynamite in Rice's home. The district court stated further that it may have been that defense counsel did not pursue the inconsistencies as a matter of trial strategy "rather than hammer home to the jury that dynamite was found in Rice's house." We find no merit to Poindexter's assertion that he was deprived of effective assistance of counsel because of the manner in which Swanson and Pfeffer were cross-examined.

At trial, Swanson testified that he found dynamite in Rice's basement and that Pfeffer was also in the basement when the dynamite was found. Pfeffer, on the other hand, testified at trial that he never went to the basement and that he did not see the dynamite until Swanson carried it up from the basement. Trial counsel did not spend time exploring who was really in the basement when the dynamite was found, and this was reasonable given that the particulars of who found the dynamite and who was with that person at the time are relatively insignificant.

6. Peak

Finally, Poindexter asserts that trial counsel was ineffective in the cross-examination of Peak. Poindexter admits that trial counsel confronted Peak with the inconsistencies in his version of the events leading up to Minard's death. But Poindexter asserts his constitutional right to effective assistance of counsel was violated, because the confrontation did not go far enough and counsel should have more forcefully asked leading questions to emphasize the impossibility of all the various claims made by Peak. We find no error in the district court's conclusion that Peak was adequately cross-examined.

The court noted that Peak was a "boy who had never been in a courtroom before" and that the jury might not have looked favorably upon a more vigorous cross-examination. But, in fact, we observe from the record that the cross-examination of Peak was quite extensive. The cross-examination of Peak by Poindexter's and Rice's trial counsel spanned over 100 pages in the bill of exceptions. Peak was questioned about the fact that in his original confession to the police on August 28, 1970,

neither Poindexter nor Rice was implicated. Peak was questioned about the fact that he had originally said that an anonymous letter had directed him to leave the suitcase in an alley and to wait in a telephone booth where an unknown woman called him and told him to call the police. Defense counsel pointed out in detail how, when Peak finally made a statement implicating Poindexter and Rice, the details of that account were significantly different from those testified to at trial, and how, in the preliminary hearing, he originally refused to testify against Poindexter and Rice.

Peak was also questioned regarding his motivation for his testimony against Poindexter. Peak admitted to the jury that in his interrogations, the police mentioned the possibility of his being sentenced to death and that he was scared. Peak also admitted that after implicating Poindexter and Rice, he was treated very well by the police and had been taken on outings to restaurants for dinner and to visit family. He admitted that his attorney had told him there was a possibility he would be allowed to plead to a lesser offense than the first degree murder he was charged with. Reviewing the trial record in this case, we determine there were clearly no constitutional deficiencies in defense counsel's cross-examination of Peak.

VI. CONCLUSION

For all the reasons stated above, we affirm the judgment of the district court denying Poindexter's motion for postconviction relief.

AFFIRMED.

COLLEEN CINGLE, SPECIAL ADMINISTRATOR OF THE ESTATE OF DANIEL LUETHKE, DECEASED, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

766 N.W.2d 381

Filed June 19, 2009. No. S-08-386.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.

2. **Negligence: Words and Phrases.** When one person owes a legal duty to another, the standard of care which defines the scope and extent of the duty is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; that is, what a reasonable person of ordinary prudence would have done in the same or similar circumstances.
3. **Negligence: Prisoners.** A jailer is bound to exercise, in the control and management of the jail, the degree of care required to provide reasonably adequate protection for his or her inmates.
4. **Negligence: Evidence: Tort-feasors.** While the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact. To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard.
5. **Negligence: Expert Witnesses.** When the conduct in question involves specialized knowledge, skill, or training, expert testimony may be helpful or even necessary to a determination of what the standard of care requires under particular circumstances.
6. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Michael A. Nelsen and Ryan P. Bailey, of Hillman, Forman, Nelsen, Childers & McCormack, for appellant.

Jon Bruning, Attorney General, and Linda L. Willard for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

STEPHAN, J.

On December 5, 2003, Daniel Luethke was in the custody of the State of Nebraska Department of Correctional Services at its Diagnostic and Evaluation Center (D & E) located in Lincoln, Nebraska. On that date, Luethke was assaulted and fatally injured by another prisoner at the facility. Colleen Cingle, as the special administrator of Luethke's estate, brought this action for damages against the State of Nebraska under the State Tort Claims Act,[1] alleging that negligence on the part of

[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003).

D & E employees was the proximate cause of Luethke's injuries and death. After conducting a bench trial, the district court for Lancaster County found no negligence on the part of D & E employees and entered judgment in favor of the State. Cingle appeals from that judgment.

FACTS

Daniel Luethke

At all relevant times, Luethke was a resident of Seward, Nebraska. The parties stipulated that "[b]efore December 5, 2003, . . . Luethke had displayed symptoms of bipolar disorder." He took medications for this condition. Luethke was adjudicated as mentally ill in Butler County, Nebraska, in 2000, and he had received mental health treatment at the Lincoln Regional Center and the "Bryan Crisis Center" in Lincoln.

In the early morning hours of December 5, 2003, Luethke's mother called the Seward County sheriff and reported that she feared he could harm himself or others. She also reported, either during the telephone call or when deputies arrived, that Luethke had made a threatening statement. Sheriff's deputies took Luethke into custody on one felony and two misdemeanor charges and transported him to the Seward County jail. While lodged at the county jail, Luethke made threatening comments to the sheriff and his staff, broke the glass in his holding cell door, and flooded his cell floor with water. At the time of these actions, Luethke was lodged alone in a cell and on a suicide watch, because jail officials felt that he might harm himself or others.

Due to Luethke's erratic behavior, the sheriff concluded that Luethke should be held elsewhere until his court appearance. The jail administrator contacted D & E about transferring Luethke to that facility as a "safekeeper." In addition to serving as the reception center for all males incarcerated in state penal institutions, D & E assists counties by taking safekeepers under a contractual agreement. In addition, D & E processes returnees to the Nebraska penal system, whether they are parole violators, interstate transfers, or transfers from community correction centers.

A deputy sheriff began the transport of Luethke from the Seward County jail to D & E in a patrol car equipped with a prisoner barrier separating the driver's compartment and rear passenger compartment. Luethke was placed in restraints for the transport. While en route, Luethke became agitated and the deputy called for backup. The sheriff arrived and assisted with the transport. When they arrived at D & E, the sheriff escorted Luethke to the admission area, removed the restraints, and instructed Luethke to go with a D & E officer. The sheriff and a D & E official executed a "Contract for Safekeeping," in which the sheriff represented that Seward County had lawful custody of Luethke and "want[ed] to procure a secure and convenient place of confinement for the safekeeper other than the county correctional facility or county jail."

Cpl. Doug Cheney, the D & E admissions officer who initially took custody of Luethke, testified that Luethke was loud and appeared to be upset, mostly with the deputy who had assisted in the transport from Seward County. Luethke became calmer and more cooperative when the sheriff and deputy left, and Cheney did not perceive him to be a threat to the institution or a potential victim.

Cpl. Jimmy Terrell, who observed Luethke during the initial admission process, described him as being very upset and demanding his medication. Terrell testified that he escorted Luethke to the D & E hospital and told Cpl. Daniel Wagner, who was on duty there, that Luethke should be kept separate from other inmates if possible and that he could "go off at any time." Luethke was no longer agitated or upset at the time of his arrival at the hospital, and Terrell's comments to Wagner were based upon Terrell's 1- to 3-minute observation of Luethke at the time of his original admission to D & E. Wagner did not recall whether or not Terrell made these comments.

Richard Randazzo, the admissions case manager at D & E, also observed Luethke at the time of his initial arrival in the early afternoon of December 5, 2003. Randazzo testified that Luethke was disruptive and abusive toward the sheriff and deputy upon arrival, but became calm and cooperative as soon as the sheriff and deputy left. Randazzo did not hear Terrell tell Wagner to place Luethke in a separate holding cell. At

approximately 1:50 p.m. on that day, Randazzo conducted a case management interview with Luethke. During this interview, Luethke told Randazzo that he had a bipolar disorder but had not been taking medication. On a form entitled "Behavioral Observations and Suicide Assessment," Randazzo noted that Luethke had received inpatient treatment for his bipolar disorder approximately 18 months prior to the intake.

Based primarily upon his observations during the interview, Randazzo rated Luethke as a low risk for (1) violence toward other inmates, (2) violence toward staff, (3) general hostility, (4) victim potential, and (5) escape or security risk. Randazzo also noted on one of the forms completed during the interview: "County Reports — Limited Space, Disciplinary Problem[,] Mental Health needs / Assaultive." According to Randazzo, Luethke insisted that he would not be at D & E for long because his family would provide money for a bond. Randazzo believed Luethke, which influenced Luethke's housing assignment. Given the potentially temporary nature of Luethke's stay, Randazzo assigned Luethke to hospital room No. 2. Despite this single-cell housing assignment, Randazzo did not have any concerns for Luethke's safety, and he knew that Luethke would be returning to a multiple-inmate holding cell until he completed intake and was transferred to his assigned housing.

Kevin Dix

Kevin Dix was born on October 13, 1969. He has a lengthy criminal record which includes convictions for robbery, assault, escape, burglary, and theft. Dix was originally incarcerated in Nebraska, but in early 2003, he was transferred to a prison in Colorado at his request. Approximately 6 months later, he was transferred back to the Nebraska penal system, again at his request.

Prior to December 5, 2003, Dix committed numerous prison misconduct offenses, some of which involved assaults and fighting. For 2½ to 3 years immediately prior to his transfer to Colorado, Dix was on administrative segregation status in Nebraska, lodged in a cell by himself, as a result of a fight with a correctional officer. Dix was also placed on segregated

status during his 2003 incarceration in Colorado, although the reason for this is not entirely clear from the record. The parties stipulated that "[p]rior to December 5, 2003, . . . Dix had engaged in episodes of violence toward others, both while incarcerated and while not incarcerated, but to the extent known had not engaged in episodes of violence toward other inmates."

Dix was transported from Colorado to Nebraska on December 5, 2003. Upon his arrival, he was processed at D & E. Randazzo conducted a case management interview of Dix during the afternoon of December 5, after his interview with Luethke. Randazzo described Dix as cooperative and easygoing during the interview. Utilizing the same self-reporting technique as he did with Luethke, Randazzo rated Dix as a low risk for (1) violence toward other inmates, (2) violence toward staff, (3) general hostility, (4) victim potential, and (5) escape or security risk.

Randazzo testified that he took some information on Dix from computer files and then confirmed the information with Dix. But Dix testified that Randazzo did not access computer files during their interview. Randazzo testified that he did not access the "Segregated Confinement," "previous criminal history," or "misconduct, restoration, positive time information" segments of Dix's computerized records, nor did he ask Dix if he had been segregated in Colorado. He testified that this information was unnecessary, because prisoners transferring into the institution are not automatically segregated based upon prior actions.

Dix testified that during the interview, he asked Randazzo if he would be housed in segregation or in the general prison population and that Randazzo asked if there was a reason he should be segregated. Dix testified that he gave a negative response, but informed Randazzo that he had been segregated while confined in Nebraska before his transfer to Colorado, as well as during his confinement in Colorado. According to Dix, Randazzo replied, "well, I have nothing here so let's pretend this conversation never existed." Randazzo was not asked about Dix's claim at trial.

Randazzo assigned Dix to a housing unit block within the general prison population. He knew that Dix would initially be placed back in the medical unit holding cell with Luethke and other inmates before going to his assigned housing unit, but he did not anticipate that this would cause any problem, because he had not observed any problems between Luethke and Dix while in the holding cell that day.

The Assault

Following Randazzo's separate interviews with Luethke and Dix, both were placed with five other inmates in a large holding cell adjacent to the medical screening area at D & E, and they were in this cell at 4 p.m. when the entire institution was locked down for the scheduled afternoon count. Wagner conducted the count of all inmates in the medical screening area, including those in the holding cell. Wagner testified that Luethke was calm and cooperative during the count and that he did not notice any unusual activity among the inmates in the holding cell.

When he completed his count, Wagner went to a nearby food preparation area and began preparing meals for the inmates. While doing this, he heard someone "kicking or . . . banging" on the door of the holding cell. When Wagner went to investigate, he observed Luethke banging on the door and asking when he would be fed. Wagner replied that as soon as the count had cleared, he would bring meals to the inmates. Wagner then went to the officer's station near the holding cell and called a lieutenant to report his encounter with Luethke. The lieutenant advised Wagner that after the count had cleared, Luethke would be moved to hospital room No. 2. Wagner testified that he perceived no reason to move Luethke immediately, and he could not have done so because the institution was still in lockdown status for the count.

Debra Saunders was a licensed practical nurse employed in the D & E hospital area on the day of the assault. She observed Wagner responding to Luethke's pounding on the holding cell door at 4:08 p.m. She testified that after Wagner spoke with Luethke at the cell door, Luethke stopped shouting and stepped away from the door to the interior of the cell.

After speaking with the lieutenant, Wagner returned to the food preparation area and resumed preparation of the inmates' meals. He was still engaged in this activity when the count cleared at 4:15 p.m. At this time, Luethke was no longer pounding on the cell door and Wagner was not aware of any unusual activity in the holding cell.

The assault occurred at approximately 4:17 p.m. Richard Zlomke, one of the inmates in the holding cell, testified that when Luethke was pounding on the cell door and demanding to be fed, Dix told him that he should stop or he would get in trouble. Zlomke and another inmate in the cell also attempted to calm Luethke. Zlomke testified that shortly thereafter, Luethke made a "challenging remark" to Dix, who immediately responded by assaulting Luethke, repeatedly striking him with his fists and kicking him. Zlomke testified that the assault lasted less than a minute and that Luethke did not defend himself.

From the nurse's station, Saunders observed Luethke hit the window of the holding cell with some force. She initially thought Luethke was having a seizure and proceeded to the holding cell. Wagner, who was still working in the food preparation area, heard a "very loud thump[ing] noise" from the vicinity of the holding cell and walked quickly in that direction. He and Saunders met at the door to the cell. Wagner looked into the cell and observed Luethke lying on the floor and Dix standing over him. He notified the emergency response team and then, contrary to protocol, unlocked the cell before the response team arrived so that Saunders could enter and provide medical aid to Luethke. As a result of injuries sustained in the assault, Luethke was left in a persistent vegetative state. He died from his injuries on October 5, 2005, at the age of 34.

In this action, Cingle alleged that employees of D & E were negligent in placing Luethke in the same holding cell as Dix, "when they knew or should have known that Dix was a violent, unstable person likely to cause harm to [Luethke.]" Cingle also alleged that D & E employees were negligent in supervising the inmates in the holding cell, in failing to separate Luethke and Dix, and in failing to respond to the assault in a "timely

fashion." The State denied that its employees were negligent and asserted various other defenses.

Following a bench trial at which experts testified on behalf of each party, the district court entered judgment for the State. The court found that D & E employees were not negligent because they "could not have reasonably foreseen that Dix would attack Luethke while in the holding cell on December 5, 2003." In reaching this conclusion, the court reasoned that Luethke's aggressive behavior upon admission to D & E was not directed at Dix, but, rather, was directed at the sheriff's deputy who transported him. The court found that there was "no indication of a particular threat existing between Luethke and Dix that would require the staff to provide extra protection for Luethke." The court also reasoned that because neither Luethke's mental state nor Dix's history of assaultive behavior was unique among prison inmates, D & E employees could have reasonably concluded that it was unnecessary to place them in separate cells.

Cingle perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENT OF ERROR

Cingle assigns that the district court erred in finding that D & E employees were not negligent in their handling of Luethke.

STANDARD OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.[3]

ANALYSIS

Legal Standard

[2,3] Cingle first argues that the district court applied an incorrect legal standard in finding that D & E employees were

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[2] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[3] See, *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007); *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002).

not negligent in placing Luethke and Dix in the same holding cell. When one person owes a legal duty to another, the standard of care which defines the scope and extent of the duty is typically general and objective and is often stated as the reasonably prudent person standard, or some variation thereof; that is, what a reasonable person of ordinary prudence would have done in the same or similar circumstances.[4] We stated the standard of care which defines the scope and extent of the duty owed by prison officials to inmates most recently in *Goodenow v. State*[5]: "A jailer is bound to exercise, in the control and management of the jail, the degree of care required to provide reasonably adequate protection for his or her inmates." The district court cited this standard in its order, but also cited *Mosby v. Mabry*,[6] a federal appellate court decision involving an assault by one inmate upon another. The district court paraphrased the following principle stated in *Mosby*: "Liability exists only if the warden or jailer knew of the risk of such injury or should have known of it and with actual or constructive knowledge, failed to prevent such an attack."[7] Cingle argues that by stating this principle, the district court applied the incorrect standard of care in assessing her allegations of negligence on the part of D & E employees.

We disagree. We do not read *Mosby* as being inconsistent with *Goodenow*. What constitutes "reasonably adequate protection" under the *Goodenow* standard necessarily depends upon what correctional officers knew or should have known about a particular risk of injury before it occurred. For example, in *Sherrod v. State*,[8] we affirmed a judgment in favor of a person who, while incarcerated, was beaten by his cellmate and sustained significant injuries. Noting the duty of jailers to exercise the degree of care required in order to provide reasonably

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[4] See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

[5] *Goodenow v. State*, 259 Neb. 375, 380, 610 N.W.2d 19, 22 (2000).

[6] *Mosby v. Mabry*, 697 F.2d 213 (8th Cir. 1982).

[7] *Id.* at 215.

[8] *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

adequate protection for inmates, we concluded that there was evidence that correctional officers "either knew or should have known" of a threat which preceded the assault and were therefore negligent in failing to separate the two prisoners.[9] This is not to say that correctional officers can be liable to an inmate assaulted by another inmate only if there is a prior specific threat, and we do not read the district court's order in this case as applying such a bright-line rule. Although the court did make a finding that "D & E staff had no indication of a particular threat existing between Luethke and Dix that would require the staff to provide extra protection for Luethke," it also examined other factors, including Luethke's mental status and Dix's prison history, in reaching its conclusion that D & E employees could not have reasonably foreseen the assault. The district court applied the same legal standard applied in *Goodenow* and *Sherrod*. We therefore proceed to the question of whether the court erred in its finding of facts.

Sufficiency of Evidence

As noted in *Sherrod*, we are mindful that in reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Cingle argues that contrary to the district court's finding, there was evidence that Dix threatened Luethke before assaulting him. One inmate in the cell at the time of the assault told investigators that during the brief verbal exchange which preceded the assault, Dix said to Luethke, "'You fuck with me and I'll kill you.'" However, it is clear that this threat was made almost immediately before the assault, and there is no evidence that any D & E employee was or could have been aware of the threat before the assault occurred. Thus, the finding of the district court that D & E staff were not aware of a threat is not clearly erroneous.

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[9] *Id.* at 365, 557 N.W.2d at 641.

Cingle's primary theory at trial was that based upon the information regarding Luethke and Dix that D & E employees actually had or could have obtained by a more thorough investigation of Dix's background, they were negligent in not anticipating the assault and placing the men in separate cells in order to prevent the assault. Stated another way, Cingle argued that based upon the evidence presented at trial, the applicable standard of care required separation of Luethke and Dix in order to protect Luethke from harm.

[4,5] While the existence of a duty and the identification of the applicable standard of care are questions of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.[10] To resolve the issue, a finder of fact must determine what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with the standard.[11] When the conduct in question involves specialized knowledge, skill, or training, expert testimony may be helpful or even necessary to a determination of what the standard of care requires under particular circumstances.[12]

Both parties in this case utilized expert witnesses for this purpose. The two qualified experts, after reviewing the essentially undisputed facts, reached conflicting opinions as to whether the conduct of D & E employees deviated from the standard of care. Victor Lofgreen, Ph.D., testified on behalf of Cingle. Lofgreen is a university professor and research scientist. He has prior experience as a military police officer, as a caseworker for the Nebraska Department of Correctional Services, as chief of the corrections division of the Nebraska Crime Commission, and as superintendent of the Nebraska Correctional Center for Women. Lofgreen reviewed various records pertaining to the assault and testified that in his opinion, with a reasonable degree of certainty, D & E employees

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[10] See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, *supra* note 4.

[11] See *id*. See, also, Restatement (Second) of Torts § 328 C, comment *b*. (1965).

[12] *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, *supra* note 4.

violated the standard of care in handling Luethke and Dix and that this failure led to the assault of Luethke. Lofgreen was critical of the fact that information on Luethke's bipolar condition was documented on the initial telephone interview intake form but was not given to Randazzo or the medical screening staff. Lofgreen opined that Luethke should have been housed in a separate cell based solely upon his bipolar disorder, that it is improper to house safekeepers with the general prison population, and that Wagner was wrong to disregard Terrell's suggestion that Luethke be placed in his own cell.

With regard to Dix, Lofgreen was critical of the fact that D & E employees did not have the information packet which usually accompanies a transfer and includes classification and mental health information. Lofgreen was critical of Randazzo's classification interview with Dix and testified that in view of his violent history, Dix should have been placed in an "isolation setting." Lofgreen further testified that Dix's own mental and behavioral history warranted treating him as a "special needs inmate" and keeping him apart from other inmates. Lofgreen expressed his opinion that the assault was an event which D & E employees should have foreseen, based on the histories of both parties.

The State's expert witness, Jeffrey Schwartz, Ph.D., is a criminal justice consultant who has worked with various law enforcement and correctional agencies since 1968. He conducts critical incident reviews after major security breaches and specializes in emergency preparedness and response in correctional institutions. He is a regular consultant for the National Institute of Corrections.

In addition to reviewing relevant documents, Schwartz personally visited D & E and interviewed Randazzo and Saunders. He testified that almost all state correctional facilities and city and county jails utilize multiple-occupancy holding cells during the intake process, because placing inmates in separate cells during intake is more difficult to supervise and requires more staff. Schwartz disputed Lofgreen's contention that safekeepers should be segregated as a matter of course and noted that safekeepers are generally treated like any other incoming inmate.

Schwartz testified that Luethke's aggressive behavior when he first arrived at D & E was not unusual for an inmate in these circumstances, and he noted that there was no indication that Luethke was acutely suicidal or floridly psychotic. Schwartz noted that Luethke assured Randazzo and Saunders that he was not suicidal, despite his statements to the contrary to the Seward County law enforcement officers. He noted that Randazzo calmed Luethke and brought him to a point where he was compliant and cooperative during the intake process.

Schwartz was critical of D & E employees in some respects. He concluded that Randazzo erred in rating both Luethke and Dix as low risk for all the factors on the initial screening intake form. In his opinion, Saunders and Randazzo should have received the information taken by D & E from Seward County in the initial call. Schwartz was critical of the failure to make available the Nebraska penal institutional history on Dix and the failure to request information from Colorado on Dix. Schwartz testified that even if these errors had not occurred, there would have been an insufficient factual basis for placing Dix in a separate cell. However, Schwartz testified to a reasonable degree of certainty that even with the additional information which D & E employees could have obtained, there would have been no basis for placing Dix in a separate cell in either the booking area or the hospital area and that "it would not have risen to where that was a very difficult or close call."

Schwartz testified that only extraordinary safety issues require immediate segregation on intake and that it is most common for previously segregated inmates to go through intake like every other inmate. Exceptions would be those inmates who had multiple escape attempts or those who were so assaultive that additional guards were required for transport. In Schwartz' opinion, Dix would not have qualified as one of the top 1 or 2 percent of assaultive inmates in any state department of corrections. Schwartz opined that Dix was clearly more assaultive than the average inmate, not easy to work with, and had more staff altercations and time in segregation, but that Dix "isn't real close" to being among the most dangerous inmates. Based on a review of Dix's disciplinary record,

Schwartz concluded that Dix would not fit the profile of a predatory inmate.

Schwartz noted there was no indication at intake that Luethke was acutely suicidal, suffering acute psychotic behavior, or hallucinating. D & E employees had no confirmed bipolar diagnosis, only speculation from the Seward County sheriff's office. Schwartz testified that in his opinion, there was no good basis for placing Luethke in a single cell at intake, and that it was reasonable to put Luethke in a multiple cell in both the booking area and medical area. According to Schwartz, Luethke neither was acting out to the point that he was likely to be assaultive toward others nor was his mental health condition deteriorated to the point that he should not have been placed with others. Schwartz explained that Luethke "was not close to psychotic. That really . . . would not have been a close call at all. Many inmates come in in worse shape in terms of mental health than . . . Luethke . . . ."

Schwartz opined that based on all the evidence he reviewed for this case, the assault was not predictable. He further testified that supervision in the hospital area was adequate and noted that no inmate requires continuous supervision. Schwartz testified that Wagner and Saunders responded appropriately when the assault occurred, except that Wagner breached security protocol by unlocking the cell door before the emergency response team arrived in order for Saunders to enter and provide immediate medical care to Luethke.

[6] Determining the weight that should be given expert testimony is uniquely the province of the fact finder.[13] In this case, it appears that the district court gave more weight to the testimony of the State's expert than to that of Cingle's expert. That was its prerogative. There is evidence in the record from which a finder of fact could reasonably conclude that D & E employees were not negligent in failing to anticipate and prevent the fatal assault, or in any other respect. We therefore cannot conclude that the factual findings on which the district court based its judgment were clearly erroneous.

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[13] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006); *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004).

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
CLIFFORD J. DAVLIN, APPELLANT.
766 N.W.2d 370

Filed June 19, 2009. No. S-08-969.

1. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
3. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.
5. ____: ____. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.

6. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
7. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
8. **Evidence: Intent.** Most, if not all, evidence is intended to be prejudicial; it is only that evidence which is unduly prejudicial that is inadmissible.
9. **Trial: Witnesses.** It is the province of the fact finder to judge the credibility of a witness.
10. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Clifford J. Davlin, pro se.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

Clifford J. Davlin was convicted of second degree murder and first degree arson in 2000. On appeal, this court affirmed Davlin's conviction for arson, but reversed his murder conviction.[1] Following a retrial, Davlin was again convicted of second degree murder. This court affirmed that conviction in 2006.[2] Davlin filed a motion for postconviction relief, which

[1] *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[2] *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

was denied by the district court without an evidentiary hearing. Davlin appeals. We affirm.

FACTUAL BACKGROUND

The facts of this case were set forth in our decision in Davlin's appeal of his first conviction:

> Tamara Ligenza, also known as Tamara Martin, was found dead in her Lincoln apartment after a fire on September 7, 1993. Ligenza was legally blind and was 6 months pregnant at the time of her death. Ligenza had been living with Davlin, but on September 6, Ligenza told Davlin to leave the apartment. . . . Davlin remained at or near the apartment building on September 6 and into the morning of September 7.
>
> Ligenza was last seen alive, by her roommate, at about 1 a.m. on September 7, 1993. Ligenza lived in a house that had been converted to a duplex with one entrance that led to both apartments. Witnesses who lived in the building testified that they were awakened at approximately 4:30 a.m. by reports of a fire in the building. Davlin was identified as being in the duplex at the time of the fire, staying in the other apartment. Firefighters removed a severely burned body from the bedroom of Ligenza's apartment; the body was later identified by dental records as Ligenza's. An autopsy was performed, and the coroner's physician concluded that Ligenza had been killed by manual strangulation prior to the fire.[3]

Davlin was originally charged in 1997 with first degree murder and arson in connection with Tamara Ligenza's death. Davlin was found guilty of second degree murder and arson in 2000. On appeal, this court reversed Davlin's conviction for second degree murder, but affirmed Davlin's arson conviction. We further noted that the State was prohibited on double jeopardy grounds from retrying Davlin on first degree murder charges.

The State then filed an amended information against Davlin on April 12, 2002, charging Davlin with second degree murder.

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[3] *State v. Davlin*, *supra* note 1, 263 Neb. at 286-87, 639 N.W.2d at 638-39.

Several pretrial motions were denied, including a motion to quash and a plea in bar. Eventually, Davlin was retried and was convicted of second degree murder. The district court sentenced Davlin to life imprisonment, to be served consecutively to his sentence of 20 to 60 years' imprisonment for arson. Davlin appealed.

Davlin was represented by different counsel on appeal. In that appeal, this court affirmed Davlin's conviction and sentence on August 4, 2006. On September 26, Davlin filed a pro se motion for postconviction relief. Davlin subsequently filed an "addendum" motion for postconviction relief, followed by a second amended motion for postconviction relief. The district court denied Davlin relief without an evidentiary hearing, concluding:

> There has been no showing of factual allegations which, if proved, constitute an infringement of [Davlin's] constitutional rights so as to render his conviction void or voidable. With respect to [Davlin's] allegations of ineffective assistance of counsel, there has been no showing that the performance of [Davlin's] trial [or his appellate counsel] was in any way deficient or, even if any deficiency does exist, that such a deficiency prejudiced [Davlin].

(Alteration in original.)

Davlin, still acting pro se, appeals.

ASSIGNMENTS OF ERROR

On appeal, Davlin generally assigns that the district court erred by not granting him an evidentiary hearing and by denying him postconviction relief. In his brief, Davlin argues, restated, that his appellate counsel was ineffective for failing to allege the following instances of ineffective assistance of trial counsel: (1) failure to present evidence regarding Davlin's defense that Ligenza was alive when the fire was set, (2) failure to adequately cross-examine Keri Dugan, (3) failure to adequately impeach the testimony of Wade Potter, and (4) failure to object to the district court's failure to file its jury instructions prior to reading them to the jury. In his fifth and final assignment of error, Davlin assigns that his trial counsel was ineffective for failing to request a continuance so that certain

witnesses from his first trial could be located and subpoenaed to testify at his second trial or to have those witnesses' testimonies from his first trial read into evidence at the second trial. This final assignment of error was raised on direct appeal, but this court declined to address it.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[4] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[5] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[6] an appellate court reviews such legal determinations independently of the lower court's decision.[7]

ANALYSIS

[2] On appeal, Davlin contends the district court failed to find that either his trial counsel or his appellate counsel was ineffective in several particulars. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland*,[8] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[9] Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[10] In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's

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[4] *State v. Lopez*, 274 Neb. 756, 743 N.W.2d 351 (2008).

[5] *Id.*

[6] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[7] *State v. Lopez*, *supra* note 4.

[8] *Strickland v. Washington*, *supra* note 6.

[9] *State v. Lopez*, *supra* note 4.

[10] *Id.*

deficient performance, the result of the proceeding would have been different.[11] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

[3,4] In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.[12] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[13]

[5-7] In this case, in addition to arguing that his trial counsel was ineffective, Davlin also argues that appellate counsel was ineffective for failing to raise the ineffectiveness of his trial counsel. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.[14] Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.[15] When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test.[16] If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.

If trial counsel was ineffective, then the defendant suffered prejudice when appellate counsel failed to bring such a claim. We must then consider whether appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland*. In other words, we examine whether the claim's

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[15] *Id.*

[16] *Id.*

merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel.[17] If it was, then the defendant suffered ineffective assistance of appellate counsel. If it was not, then the defendant was not denied effective appellate counsel.

Failure to Pursue Defense That Ligenza Was Killed by Fire.

Davlin first assigns that his appellate counsel was ineffective for failing to allege the ineffectiveness of trial counsel in failing to pursue a defense that Ligenza was not killed by strangulation, but instead was killed by the fire. Davlin points to evidence that there was a 1.2-percent level of carbon monoxide in Ligenza's system at the time of her death. Davlin, relying on medical encyclopedias, argues that this level suggests Ligenza was alive at the time of the fire and that the carbon monoxide from the fire was the cause of her death, not any alleged strangulation by Davlin.

At trial, the State presented evidence from three pathologists suggesting that Ligenza was dead before the fire was set: in particular, the pathologists noted that Ligenza's muscle was its usual reddish-brown color, while Ligenza's dying in the fire would cause the muscle to be a different color, probably a cherry red. There was also testimony regarding the lack of soot in Ligenza's mouth or nose, the lack of a high level of carbon monoxide in her system, and a lack of vital response on Ligenza's skin. In addition, a burn specialist testified that Ligenza was not alive at the time of the fire, as evidenced by the lack of any evidence of inhalation of hot gas—blistering of the mouth, swelling of the lips or tongue, and charring of the lips or the roof of the mouth.

Because of this overwhelming evidence that Ligenza was dead prior to the fire, we conclude that Davlin was not prejudiced by any failure of trial counsel to pursue Davlin's suggested defense. We further note that Davlin is essentially arguing that his trial counsel was ineffective for failing to pursue a defense that suggested Davlin did not strangle the victim, but

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[17] *Id.*

instead set her on fire. We fail to see how Davlin could have been prejudiced by his trial counsel's failure to pursue such a theory.

Davlin was not prejudiced by any failure on the part of his trial or appellate counsel to raise this defense and was therefore not entitled to postconviction relief on this point. Davlin's first assignment of error is without merit.

Testimony of Keri Dugan.

In his second assignment of error, Davlin argues that appellate counsel erred in failing to raise on appeal the ineffectiveness of his trial counsel with regard to the cross-examination of Dugan, an acquaintance of Davlin.

Dugan testified for the State. On direct, Dugan was asked about the events preceding the fire in the early morning of Ligenza's death. Dugan testified that she went to visit Richard Guilliatt, who resided in an apartment in a duplex. (Ligenza resided in the other apartment in the duplex.) Dugan testified that after entering the apartment, she said hello to Davlin, who was in the apartment with Guilliatt. In response to Dugan's greeting, Davlin replied, "'That bitch kicked me out.'"

On cross-examination, Dugan was asked about Davlin's apparently unsolicited statement about being "kicked out." Trial counsel had Dugan refresh her memory from police notes taken during the interview in the hours after the fire. Upon refreshing her recollection, Dugan then testified that at the time, she told the officer that she "just said hi [to Davlin], and that was it." The State then questioned Dugan on redirect, and asked whether in that interview the officer had specifically asked her whether Davlin had said anything to her. Dugan replied that the officer did not ask her that question, but that in fact, Davlin had said something to her, namely that the "'bitch kicked me out.'"

As we understand Davlin's argument on appeal, he contends appellate counsel was ineffective for failing to allege that trial counsel was ineffective in failing to object to Dugan's testimony, on redirect, that Davlin told her that the "bitch kicked him out." Davlin argues that allowing Dugan to testify to this a second time was unduly prejudicial.

[8] Davlin's argument is without merit. Most, if not all, evidence is intended to be prejudicial; it is only that evidence which is unduly prejudicial that is inadmissible.[18] And this testimony was brief, was impeached by trial counsel (as having not been initially told to police), and, given the weight of the remaining evidence against Davlin, was not likely to have changed the results of the proceedings. We conclude that Davlin was not prejudiced by any alleged deficiency in trial counsel's performance and therefore was not prejudiced by appellate counsel's failure to raise this issue on direct appeal.

We additionally note Davlin appears to argue that trial counsel failed to effectively cross-examine Dugan with regard to prior statements made stating that everyone, including Davlin, was asleep when Dugan entered the apartment, and thus Davlin could not have told Dugan that Ligenza had "kicked him out." However, the district court was not presented with this allegation in any of Davlin's three motions for postconviction relief, and we need not address it here.

[9] Finally, to the extent Davlin argues that his trial counsel was ineffective for failing to ask the district court to admonish the jury that Dugan was lying, such argument is without merit. It is the province of the fact finder, in this case the jury, to judge the credibility of a witness[19]; it would be improper for the trial court to suggest that a witness was not being truthful. As such, trial counsel could not have been ineffective in failing to ask for such an admonishment, nor could appellate counsel have been ineffective for failing to raise the issue on direct appeal.

Davlin's second assignment of error is without merit.

Testimony of Wade Potter.

Davlin next assigns that his appellate counsel was ineffective for failing to allege that trial counsel erred in his cross-examination of Potter.

Potter testified at trial that when he and Davlin were in the Sarpy County jail together, Davlin confessed to him that he,

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[18] See *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994).

[19] See *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

Davlin, killed Ligenza. Potter was cross-examined as to his motive for reporting this confession, his changing story, and his criminal record, but trial counsel did not attempt to impeach Potter's testimony by suggesting that Potter and Davlin were not housed together at the Sarpy County jail. It is this omission which Davlin now argues was ineffective.

[10] As an initial matter, we note that Davlin does not actually allege that he was not acquainted with Potter from the time spent at the Sarpy County jail, nor does he allege that the fact he and Potter were not housed together necessarily means the two had no contact. We thus question whether Davlin has alleged sufficient facts to support his claim of ineffective assistance of counsel. An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[20]

But in any case, we note that in addition to Potter's testimony that Davlin confessed to killing Ligenza, three other witnesses also testified to the same. And these confessions were in addition to other evidence also supporting a finding of Davlin's guilt. We conclude that Davlin was not prejudiced by any alleged deficient performance with respect to Potter's cross-examination and that appellate counsel was not ineffective for failing to raise such issues on direct appeal. Davlin's third assignment of error is therefore without merit.

Failure to File Jury Instructions.

In his fourth assignment of error, Davlin contends that his appellate counsel erred in failing to allege the ineffectiveness of trial counsel in not objecting to the district court's failure to file jury instructions in compliance with Neb. Rev. Stat. § 25-1114 (Reissue 2008) and also in failing to object to the verdict and sentence rendered against him for the same reasons.

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[20] *State v. Jim*, 275 Neb. 481, 747 N.W.2d 410 (2008).

Section 25-1114 provides in part that jury instructions must be filed by the clerk before being read to the jury by the court. It is clear such did not occur in this case since, according to the record, the instructions were given to the jury on January 31, 2005, but not filed with the clerk until February 1.

Assuming Davlin is correct that his trial counsel's performance was deficient by his failure to object to the failure of the court to file the instructions, we conclude Davlin is unable to show that he was prejudiced by this failure. Specifically, Davlin contends he was deprived of his due process rights when the district court failed to file the instructions before instructing the jury. Beyond this general assertion, however, Davlin makes no specific argument about how he was harmed by this failure.

And indeed, it is clear that Davlin's due process rights were not violated by any failure to have the jury instructions filed prior to being read to the jury. A review of the record shows the district court held a jury instruction conference with Davlin, his counsel, and the prosecutor all present. Davlin's counsel fully participated in this conference. Davlin and his counsel were fully aware of all instructions prior to the time the instructions were given to the jury. Additionally, we note Davlin does not argue that any of those instructions were erroneous.

Davlin was not prejudiced by the failure of his counsel to object to the district court's failure to file the instructions with the clerk before reading them to the jury. As such, Davlin's appellate counsel was not ineffective for failing to raise the issue on direct appeal. We conclude that Davlin's fourth assignment of error is without merit.

Failure to Produce Testimony of Certain Witnesses.

Finally, Davlin assigns that his trial counsel was ineffective for failing to subpoena and/or produce the testimony of two witnesses from the first trial. We note that these issues were raised by appellate counsel in Davlin's direct appeal, but that this court declined to reach the issue, given the state of the record before us.

Though it is not entirely clear from the record, apparently these witnesses—Guilliatt and Lee Davis—both testified at Davlin's first trial. Davlin generally claims in his motion that Guilliatt and Davis would provide him with an alibi and would provide other exculpatory evidence. In his motion, Davlin also generally alleges that trial counsel was ineffective for failing to introduce Guilliatt's and Davis' testimonies from the first trial in lieu of live testimony at his second.

Davlin's first argument—that trial counsel was ineffective with respect to his failure to subpoena and/or produce the testimony of Guilliatt and Davis—is without merit. In fact, a review of the record demonstrates that trial counsel actually requested a continuance in order to attempt to locate the witnesses and had subpoenas issued which could not be served because the witnesses could not be located. We conclude that because trial counsel actually did what he is now accused of not doing, his performance could not have been deficient.

With respect to Davlin's other contention—that trial counsel was ineffective for failing to introduce Guilliatt's and Davis' testimonies from Davlin's first trial—we conclude that Davlin has not alleged sufficient facts to entitle him to postconviction relief.

As is noted above, an evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution; no such hearing is required where a motion alleges only conclusions of fact or law.[21]

In his motion, Davlin alleges the following:

> Trial counsel provided ineffective assistance of counsel by not offering the sworn prior testimony of . . . Davis and . . . Guilliatt if, in fact, witnesses Guilliatt and Davis [were] unavailable and in so doing failed to offer important exculpatory and alibi evidence. [Davlin] was prejudiced thereby and such error was not harmless beyond a reasonable doubt.

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[21] *Id.*

There is nothing in Davlin's motion (or indeed in the record) that would suggest the nature of the exculpatory evidence to which Guilliatt and Davis would testify. Nor is there any indication what alibi either might provide Davlin. Rather than providing any detail, Davlin alleges only conclusions of fact and law. Such are insufficient to support the granting of an evidentiary hearing. As such, Davlin's fifth and final assignment of error is without merit.

CONCLUSION

The decision of the district court denying Davlin's motion for postconviction relief should be affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

IN RE INTEREST OF ANGELICA L. AND DANIEL L., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARIA L., APPELLANT.

767 N.W.2d 74

Filed June 26, 2009. No. S-08-919.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
3. **Child Custody: States.** The whole subject of domestic relations, and particularly child custody problems, is generally considered a state law matter outside federal jurisdiction.
4. **Juvenile Courts: Jurisdiction.** The jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants.
5. ____: ____. To obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 2004).
6. ____: ____. Neb. Rev. Stat. § 43-3804 (Cum. Supp. 2006) does not create a jurisdictional prerequisite to a juvenile court's exercise of jurisdiction.

7. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Reissue 2008), in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.
8. **Constitutional Law: Parental Rights: Courts.** The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.
9. **Parental Rights: Proof.** Before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness.
10. ____: ____. Until the State proves parental unfitness, the child and his or her parents share a vital interest in preventing erroneous termination of their natural relationship. In other words, a court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.
11. ____: ____. The fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness.
12. **Parental Rights.** The placement of a child outside the home for 15 or more of the most recent 22 months under Neb. Rev. Stat. § 43-292(7) (Reissue 2008) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.
13. **Parental Rights: Proof.** Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.
14. **Constitutional Law: Parent and Child: Presumptions: Proof.** When considering whether removal from parental custody is in the best interests of the child, the determination requires more than evidence that one environment or set of circumstances is superior to another. Rather, the "best interests" standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent. This presumption is overcome only when the parent has been proved unfit.
15. **Parent and Child.** The law does not require the perfection of a parent.
16. **Courts: Child Custody.** The Nebraska Supreme Court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might "better provide."
17. **Parental Rights: Evidence: Proof.** It is the burden of the State, and not the parent, to prove by clear and convincing evidence that the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the case plan.
18. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Appeal from the County Court for Hall County: PHILIP M. MARTIN, JR., Judge. Reversed.

Jeffrey R. Kirkpatrick and Sheri A. Wortman, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., and Brian D. Buckley, Christopher M. Huck, and R. Omar Riojas, of DLA Piper, L.L.P. (U.S.), for appellant.

Monika E. Anderson, Special Assistant Attorney General, and Robert J. Cashoili, Deputy Hall County Attorney, for appellee State of Nebraska.

Vincent M. Powers, of Vincent M. Powers & Associates, and Shari Lahlou, Barbara H. Ryland, and Christine Sommer, of Crowell & Morning, L.L.P., for amicus curiae Legal Momentum.

Victor E. Covalt III, of Ballew & Covalt, P.C., and John De Leon, of Chavez & De Leon, P.A., for amicus curiae Consulate General of Guatemala.

Michael Kneale, guardian ad litem.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

MCCORMACK, J.

I. NATURE OF CASE

In this appeal, we must balance the conflicting right of an undocumented immigrant, Maria L., to maintain custody of her children, with the State's duty to protect her children who came with her or were born in this country. Maria failed to take her child, Angelica L., for a followup doctor's appointment despite a diagnosis of respiratory syncytial virus (RSV) and her worsening condition, which failure led to Maria's arrest and deportation. Maria's other child, Daniel L., and Angelica were placed in temporary emergency custody with the Nebraska Department of Health and Human Services (DHHS), and they were not allowed to reunite with Maria when she was eventually deported to Guatemala. Despite Maria's attempts to satisfy a DHHS case plan to regain custody, her parental rights were eventually terminated.

Because of the State's involvement with the family, Maria's parental rights under Nebraska's juvenile law have collided

with the sanction imposed on her by immigration law. We must now address the needs of these vulnerable children who are caught in the clash of laws, culture, and parental rights that occur when their parents cross international boundaries. But this responsibility initially lies with child protection workers and courts in the State's juvenile system. In the present case, the task of the child protection workers, and consequently our task, would have been much easier if the Guatemalan consulate had been included in these proceedings earlier. We ultimately conclude that the evidence was insufficient to terminate Maria's parental rights.

II. BACKGROUND

1. Maria and Her Children

Maria, a native of Guatemala, is the mother of four. In addition to Angelica and Daniel, Maria has two other sons. Maria's native language is Quiché, and Spanish is her second language. Maria first came to the United States in 1997 to forge a better living for herself and her two sons, her only children at that time. During the period that Maria lived in the United States, her two sons remained with family members in Guatemala.

In 1998, Maria lived in Michigan and worked in a slaughterhouse. Maria gave birth to Daniel on February 13, 1998. When Daniel was approximately 5 years old, Maria went back to Guatemala to take care of her ailing mother. Maria left Daniel in Michigan under her sister's care while she was gone. Maria's mother ultimately passed away, and about 11 or 12 months after leaving the United States, Maria returned by illegally crossing the border through Arizona.

In January 2004, Maria gave birth to Angelica. It is unclear whether the birth occurred shortly before or after Maria reentered the United States in 2004. Regardless, Angelica was born about 2 months prematurely.

By the time Angelica was 1 month old, Maria, Daniel, and Angelica were living in Grand Island, Nebraska. Their whereabouts during Angelica's first month of life are unclear. Angelica received medical attention and care for the first time at 1 month of age, when Maria brought Angelica to Saint Francis Medical Center (Saint Francis) in Grand Island. At that

time, Angelica weighed 3 pounds 9 ounces and was suffering from dehydration, malnutrition, a urinary tract infection, and a left pulmonary branch stenosis. Angelica remained in the hospital for several days and was eventually discharged on March 3, 2004. By the time of her discharge, Angelica weighed 4 pounds 14 ounces and she was in good condition.

The medical records regarding Angelica's first hospital visit indicate that Maria expressed her desire and determination to live in the United States. Aware of Maria's desire to remain in the United States, Angelica's treating physician warned Maria that if she did not follow her instructions, then she would recommend that Maria be deported. Angelica's treating physician was concerned about Maria's medical judgment because Angelica had not been provided medical care sooner. Angelica's treating physician told Maria that if she did not follow up on Angelica's medical care, she would notify Child Protective Services.

Shortly after Angelica was discharged from Saint Francis, Maria voluntarily sought the assistance of "Healthy Starts"—a program that provides education on the growth and development of newborn babies. Maria sought the assistance of Healthy Starts because she wanted information on how to properly care for Angelica. Through Healthy Starts, Maria met Lisa Negrete, a Healthy Starts employee. Negrete began making regular checks on Angelica at her home to follow up with Angelica's care. She also made regular visits to the house of Angelica's babysitter. The record reveals that after Maria became involved with Healthy Starts, DHHS was contacted on certain occasions regarding Angelica's and Daniel's well being. But after investigation, all reports were deemed unfounded.

On April 3, 2005, Maria brought Angelica to Saint Francis because Angelica had a fever and was having problems breathing. Angelica was diagnosed with RSV. Through a Spanish language interpreter, Maria was instructed to give Angelica nebulizer treatments every 4 to 6 hours as needed and "to follow up with [the doctor] in two days or return if she is worse."

Maria did not take Angelica back to the doctor because she thought that Angelica was recovering, so there was no need to return to the hospital. According to Negrete, however, who

observed Angelica at the babysitter's home sometime between April 5 and 7, 2005, Angelica had a temperature of over 100 degrees, was lethargic, smelled foul, and had on clothing stained with vomit. Negrete also observed that there was no medication in Angelica's bag. Negrete told the babysitter to advise Maria to take Angelica to the hospital right away.

Negrete contacted DHHS on April 7, 2005, stating that Angelica was diagnosed with RSV and was not improving or receiving any of her medication. The April 7 report also contained allegations of abuse, but these allegations were never substantiated and were deemed to be unfounded. Based on this report, Collete Evans, a DHHS social worker, and Doug Cline, a Spanish-speaking police officer, went to Maria's home to follow up on the report. When they arrived at Maria's home, Maria answered the door, but she misidentified herself as the babysitter. Maria told Evans and Cline that Maria had left while she was sleeping. Maria later explained that when she saw the police, she was afraid she would lose her children and be deported.

Later that day, Evans and Cline went to the babysitter's home and discovered that the woman who had previously identified herself as the babysitter was actually Maria. Cline observed Maria nursing Angelica, and in his opinion, Angelica appeared to be sick. He testified that Angelica cried out but that she had no tears. Evans testified similarly, stating that Angelica appeared lethargic, was warm to the touch, smelled foul, and had no tears when she attempted to cry.

Maria was immediately arrested for obstructing a government operation, and Angelica was placed in emergency protective custody. Daniel was at school and was also placed into protective custody. Cline explained that Daniel was placed in protective custody "simply to provide care for him while [Maria] was incarcerated." Angelica was placed in protective custody because Maria allegedly neglected her by not providing proper medical care.

After Angelica was removed from her home and placed in the custody of DHHS, Angelica was taken to the emergency room and was hospitalized for 4 days. Once her symptoms were under control, Angelica was released to foster placement.

Shortly after her arrest, Maria was taken into custody by U.S. Immigration and Customs Enforcement. The original obstruction charges against Maria were not pursued. Maria was scheduled to be deported on May 10, 2005. On April 8, 2005, the State filed a juvenile petition alleging that Angelica and Daniel were juveniles as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) because they lacked proper parental care by reason of the fault or habits of Maria (count I); because Maria neglected or refused to provide proper or necessary assistance, education, or other care necessary for their health, morals, or well being (count II); and because they were in a situation or engaged in an occupation dangerous to their life or limb or injurious to their health (count III).

On April 13, 2005, the court held an initial hearing. Maria attended the hearing, but was not represented by counsel. Through a Spanish language interpreter, she was informed of her rights and the nature of the petition. Maria generally denied the allegations. Because Maria was incarcerated, the court ordered that Angelica and Daniel should remain in the temporary custody of DHHS pending adjudication.

The State was aware that Maria's incarceration was a temporary condition pending deportation. However, the State determined that it would not be returning the children to Maria to take with her to Guatemala "based on concerns [it] had for their safety." During the month that Maria was incarcerated pending deportation, she was provided only one visit with her children.

Although aware that Maria would no longer be in the country by that time, the court set the adjudication hearing for July 11, 2005. Maria was therefore not present at the hearing. She was instead represented by her legal counsel. At the State's request, the court struck count I of the petition. In support of its remaining allegations, the State offered as evidence the affidavit of Shawn LaRoche, a Child Protective Services worker employed by DHHS; a report prepared by the court-appointed special advocate; and the genetic testing report demonstrating that Maria was Angelica's biological mother. Maria's counsel presented no evidence on Maria's behalf.

LaRoche's affidavit, which was the original affidavit relied on when the children were removed, summarized the events of April 7, 2005, and stated that in LaRoche's opinion, it would be in the best interests of the children to be placed in the temporary custody of DHHS. The court concluded that immediate reunification of Angelica and Daniel in the parental home would be contrary to their health, safety, and welfare because Maria had been deported to Guatemala. The court ordered temporary custody of Angelica and Daniel to remain with DHHS and ordered DHHS to prepare a plan of rehabilitation. DHHS placed the children in at least three different foster families until they were placed, on September 6, 2005, with their current foster parents.

2. Case Plans

The court held dispositional hearings on September 8 and December 8, 2005, and June 15, 2006. At all of the dispositional hearings, Maria was unable to attend and counsel appeared on Maria's behalf. At the September 8 hearing, the court reiterated its finding that placement of the children with their foster parents was appropriate and that reunification would be contrary to the children's health, safety, and welfare. The court adopted the case plan, which was prepared by Lisa Hannah, a protection and safety employee for DHHS. The court instructed Maria's counsel to advise her that failure to comply with the case plan, combined with the children's being out of the home for 15 or more of the most recent 22 months, would trigger a motion to terminate parental rights.

The permanency goal of the case plan was reunification. Other goals of the September case plan included providing for the basic needs of the children, providing a safe and nurturing environment for the children, achieving timely permanency for the children, and addressing any individual mental health needs Maria may have had to effectively parent. Additionally, the case plan listed several tasks for Maria, including maintaining a job, maintaining an appropriate residence, not associating with individuals that are involved in criminal activities, and scheduling and completing a psychological evaluation. Maria was to keep in regular contact with the case manager, including providing

notification within 48 hours of any change in employment, residence, or contact information; maintaining contact with the children through telephone calls and letters at least once a month; keeping the case manager informed of any progress or contacts with professionals; and taking a parenting class and providing a certification of completion to the case manager. Because Maria was in Guatemala and DHHS had kept the children in Nebraska, physical visitation was not possible. Contact with the children was instead established through telephone calls. Although Maria wanted to initiate telephone calls with her children, she was not provided with a telephone number to contact the children and any contact with the children had to be initiated by their foster parents.

A few months after arriving in Guatemala, Maria contacted two missionaries, William Vasey and Pastor Tomas DeJesus, seeking help regaining custody of her children. Maria provided Hannah with Vasey's contact information and gave her permission to discuss her case with Vasey and DeJesus. The record indicates that Maria contacted DHHS several times, inquiring about how she could get her children back. All of Maria's communications with DHHS took place through the use of Spanish language interpreters because Hannah did not speak Spanish.

Hannah informed Vasey about the general goals and requirements of the case plan in August 2005. Sometime in February 2006, Hannah spoke to Maria over the telephone and through a Spanish language interpreter, and she read Maria the contents of the case plan. Hannah admitted that Maria never received a physical, translated copy of the case plan—even though DHHS generally provided translated copies to other non-English speakers.

On March 10, 2006, Hannah contacted Maria after learning that Maria had some questions about the case plan. At that time, Hannah told Maria that they were having difficulty arranging parenting classes and counseling for her, so Maria would "have to take the initiative for that" herself.

On June 2, 2006, Maria provided Hannah with DeJesus' contact information. Hannah testified that she discussed the requirements of the case plan with DeJesus and that DeJesus

said he would follow through on providing her with progress reports, counseling, and setting up parenting education classes for Maria. From that point on, most of Hannah's communications about Maria's case were with DeJesus, and Maria assumed that he provided Hannah with the information she needed regarding Maria's compliance with the case plan.

Although it was Hannah's job to monitor Maria's progress, Hannah admitted she could not do so because of Maria's location. Nevertheless, it was Hannah's opinion that Maria had failed to comply with the case plan requirements. Hannah testified that for the most part, Maria maintained contact with her and the children but that there was a period of time when she did not know how to contact Maria. Hannah stated further that she never received verification that Maria had completed a parenting class and that she knew that parenting classes were available in Guatemala. Hannah admitted that the parenting class requirement was not based on Hannah's personal observations of Maria, but was more or less a fail-safe matter. Finally, Hannah explained that she never received a psychological evaluation of Maria—although she did receive a written report discussing the mental health issues that women face in Guatemala.

3. Termination of Parental Rights Hearings

Based on Maria's failure to strictly comply with the case plan and the passage of more than 15 months of the most recent 22 months in foster care, on September 22, 2006, the State filed a motion to terminate parental rights. An initial hearing on the matter was held on November 9, and a hearing on the motion to terminate was scheduled for January 22, 2007. The case was continued several times so that Maria could obtain an entry visa to participate in the termination hearings. Hearings on the motion to terminate were eventually held on December 17 and 18, 2007, with Maria present.

During the hearings, the court heard testimony from various witnesses including Dr. John Meidlinger, a clinical psychologist; the foster mother; Hannah; Cline; Margorie Creason, a protection and safety worker of DHHS; Maria; Negrete; Evans; and Vasey.

Meidlinger testified that he believed it would be in both Angelica's and Daniel's best interests to remain with their foster parents. Meidlinger testified at length regarding the emotional trauma the children would suffer if they were uprooted from their foster parents and sent to live in Guatemala. Meidlinger stated that the children were currently well adjusted to their foster care and had a positive relationship with their foster parents. It was Meidlinger's opinion that if the children were sent to Guatemala, they would "experience culture shock, disorientation, fearfulness, sadness and anger." He posited that Daniel would need special help and reassurances expressing those feelings, but that the adjustment would not be as difficult for Angelica. Meidlinger opined that Daniel would suffer long-term effects such as "anger and confusion on a long-term basis; a sense of alienation or loss, a sense of sadness and depression, and likely future difficulties developing close and trusting relationships with other people." Meidlinger predicted that Angelica would suffer short-term problems similar to Daniel's, including anxiety, depression, culture shock, problems developing close interpersonal relationships, and a lifelong sense of loss and grief if she were returned to Maria in Guatemala.

Meidlinger testified that the standard of living in Guatemala is lower than the standard in the United States, the people are poorer, and there are less economic opportunities. Meidlinger was unfamiliar with the educational system or athletic opportunities available in Guatemala.

When asked what characteristics a parent needed for Angelica and Daniel to appropriately adjust, he stated:

> They would have to have a parenting figure who was completely committed to them, who had a foundation herself in the culture and some stability, both emotional and economic, and she would have to be very skilled in understanding that the children were going to have a variety of emotional reactions, that they could not be punished out of those reactions; that they needed to be allowed to express those feelings; and that they would have a depth of love and compassion; that would help the children connect to that person, that mother, probably; and, that bond

> of attraction and caring would be enough for the children to let go of some of the feelings of loss about what they no longer have.

Meidlinger did not testify as to his opinion whether Maria could meet the children's needs. Nor did he indicate that he had any concern that Maria would physically harm the children or any concern regarding her attachment to them.

Negrete likewise stated that she never observed any signs of physical abuse to Angelica. She testified that Angelica's emotional attachment to Maria seemed to decrease after Maria started working full time. According to Negrete, Maria's behavior with Daniel was appropriate but unaffectionate.

Hannah explained that the children were removed from Maria's custody due to concerns about Angelica's health. After that, normal visitations were impossible due to Maria's living in Guatemala. Hannah admitted that Maria stayed in contact with her children through telephone conversations and that their foster mother would report to Hannah about how the conversations went. Hannah testified that the conversations "went okay."

Creason began working on Maria's case in October 2007, and she testified generally as to her observations of the children as well adjusted to foster care. She noted that all of their medical and dental care is paid for. She also expressed concerns over Maria's past history of medical neglect of Angelica and Maria's "non-performance" of the case plan.

Maria testified through the aid of a Spanish language interpreter. Regarding the circumstances in 2005 which led to her arrest and the children's being removed from her custody, Maria stated:

> [The doctor] said that I was supposed to come back on Tuesday. I didn't have a ride and I didn't have a car to take her back, and that's why I didn't come back. After those days I thought that she was getting better, that's why I decided I wasn't going to take her back.

Maria explained her living situation in Guatemala. She lives in Guatemala with her two other sons, who are 18 and 15 years old. There is a hospital within 10 minutes' walking distance from her home, and Maria testified that she can receive

free medications for herself and her children. Maria testified she has beds and bedding, food, pots, pans, running water, electricity, and clothing. Maria also explained that there are at least three schools where she lives that the children could attend. Maria testified that she has maintained employment. The record indicates that together with her two older sons, the family earns a suitable income by Guatemalan standards. When asked about the breathing treatments Angelica may require if she gets ill again, Maria stated that she would take Angelica to the doctor in Guatemala and that she can get the medicine Angelica needs.

Vasey discussed his observations of Maria. Vasey has had close contact with Maria since June 2005. When asked if Vasey had concerns about returning the children to Maria, including whether they would receive proper medical care and education, Vasey testified that he had no concerns and would not hesitate to return the children to Maria. Vasey testified that Maria has strong ties to her community and that the people in her community respect her. Vasey also had no concerns about the education the children would receive in Guatemala. According to Vasey, Maria's two other sons lead healthy lives in Guatemala. Vasey stated he was "really impressed with [Maria's] ability as a caretaker and provider for those boys."

The State did not offer any evidence to rebut the testimony that Maria has established an appropriate residence in Guatemala or that she is a suitable caretaker to her sons in Guatemala.

The court received into evidence Angelica's and Daniel's medical records from 2004 through 2005. Those records show that Maria provided medical care to Angelica and Daniel on several occasions. On April 1, 2004, Maria, concerned about Angelica, brought Angelica to the emergency room because she was crying, would not eat, had a fever, and had not had a bowel movement. The report indicates the diagnosis as "Fussy baby. Nasal congestion." Angelica was discharged in stable condition. On July 2, Maria sought emergency medical attention for Angelica because she had a "[f]ever and [was] not eating." Angelica was diagnosed with an ear infection and fever, and she was discharged in stable condition. On July 18, Maria

brought Angelica into the emergency room again because Angelica was fussy and had a fever. The records indicate that Angelica was diagnosed with an ear infection in both ears and gas, and she was discharged in stable condition. On February 20, 2005, Maria brought Angelica to Saint Francis complaining of a fever, cough, and runny nose. The medical notes indicate that Angelica was in "no acute distress," and she was diagnosed with an upper respiratory infection and ear infection.

Maria also sought medical care for Daniel. The record indicates that Daniel was taken to the emergency room on July 2, 2004, because he was vomiting. The medical records state, "Apparently he has vomited x five tonight. He started at approximately 4:30. He has not been eating well but has been taking fluids such as juice and pop with no difficulty since. He has been acting pretty normal but his mom brings him in for evaluation." Daniel was diagnosed with gastroenteritis and was discharged in stable condition with no pain. On February 22, 2005, Maria again sought medical attention for Daniel. Daniel was diagnosed with influenza and sent home.

Two home studies were entered into the record regarding Maria's ability to care for her children in Guatemala. One home study was prepared by Josefina Maria Arellano Andrino, a child and adolescent agency supervisor on behalf of the "Child & Adolescent Agency" in Guatemala, and the other home study was prepared by Vasey. Both home studies were prepared at the State's request.

In the home study prepared by Vasey, he stated that "Maria is able to provide a very stable life to her family." Vasey's home study indicates that Maria has provided for her two other sons with appropriate clothing and food, and she earns a suitable income. Vasey's home study also stated, "[Maria] has a reputation in town as being an excellent mother." Vasey described Maria as being surrounded by extended family and as having strong ties to her community.

After termination proceedings were already underway, DHHS requested Andrino's home study to obtain a report that "was a little more neutral" than the home study prepared by Vasey. The Andrino study contained conclusions similar to Vasey's. Andrino discussed Maria's living conditions, explaining that

Maria has maintained suitable housing. The home study states that Maria, "in spite of her cultural and low education level, has shown to be a woman that struggles and makes efforts to give her children a better quality life." Andrino considers it to be in the children's best interests that they be reunited with Maria. As such, she recommended that the children be returned to Maria.

4. Communications With Guatemalan Consulate

Hannah testified that she faxed a letter to the consulate for Guatemala in Houston, Texas, in July 2005, inquiring about Maria. Hannah also testified that on February 14, 2007, she contacted the U.S. Embassy in Guatemala to get information and to request a home study. The record contains letters from an attorney for the Guatemalan consulate general in Miami, Florida, and the Guatemalan consulate in Denver, Colorado. The letter from the Colorado consulate indicated it never received notification concerning Maria's case prior to the commencement of the termination proceedings. The letters also indicate that there were services available in Guatemala designed to monitor and protect the well-being of children and that transportation is available for the children to return to Guatemala to live with Maria.

5. Disposition

The juvenile court rejected Maria's argument that it lacked jurisdiction due to violations of the Vienna Convention on Consular Relations (Vienna Convention),[1] concluding that its jurisdiction was authorized by § 43-247. The court stated:

> Even if this Court were to find that notification was required, which it does not, the testimony of the case worker in this case indicated that phone calls were made and faxes were sent to the Guatemalan Consulate and, in fact, the file in this case indicates contact at a later point by counsel undertaking representation of the Guatemalan Consulate.

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[1] See Vienna Convention on Consular Relations, art. 37, Apr. 24, 1963, 21 U.S.T. 77, 102.

The court next held that the State had met its burden of proof and that termination was in the children's best interests. The court questioned whether parental unfitness needed to be established in this case in order to terminate parental rights, but it concluded that, regardless, the State provided sufficient evidence of Maria's unfitness. Specifically, the court stated that Maria "either A) embarked on an unauthorized trip to the United States with a newborn premature infant or B) gave birth to a premature infant in the United States. In either event, it is clear that [Maria] did not provide the basic level of prenatal and postnatal care . . . ." Additionally, the court stated Maria's fear of deportation "serves as no excuse for her failure to provide the minimum level of health care to her children."

With regard to Maria's compliance with the case plan, the court concluded that despite "serious obstacles," DHHS "went to great lengths to communicate the requirements and expectations" of the case plan to Maria and that Maria failed to comply with those requirements. In so concluding, the court stated "there is no requirement that [DHHS], to effectuate a case plan, lead a mother by the hand to the services." The court remarked that "[b]eing in the status of an undocumented immigrant is, no doubt, fraught with peril and this would appear to be an example of that fact."

The court noted that neither Angelica nor Daniel were familiar with Guatemala or had ever met their two half siblings and that both children were thriving in the only locality they have ever known with the only parental figures they have ever known. Accordingly, the court terminated Maria's parental rights.

Maria filed a motion for new trial alleging that new evidence was available to establish that she had received and completed parenting classes. Maria sought to introduce the new evidence to prove that she had complied with the case plan. When Maria was asked why she had not informed Hannah sooner that she completed a parenting class, Maria testified that she was not asked whether she had completed the parenting class, and she testified that she assumed DeJesus was keeping Hannah informed about the counseling. Maria also maintained that she

had a difficult time understanding what people said at the termination hearings, because Spanish is her second language and everyone was talking too quickly. The court denied the motion and concluded that Maria did not sufficiently establish that the information was not available at the time of the termination hearings. Maria appeals.

III. ASSIGNMENTS OF ERROR

Maria assigns, restated and reordered, that the juvenile court erred in (1) concluding that her parental rights should be terminated pursuant to Neb. Rev. Stat. § 43-292(6) and (7) (Reissue 2008), (2) concluding that it was in the children's best interests to terminate her parental rights, (3) concluding that her due process rights were not violated, (4) allowing her counsel to deliver ineffective assistance of counsel, and (5) overruling her motion for new trial. Maria also contends that the court had no jurisdiction to enter any order with respect to Angelica or Daniel.

IV. STANDARD OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.[2] However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.[3]

V. ANALYSIS

1. Jurisdiction

Maria maintains that the juvenile court lacked jurisdiction to determine custody. Maria argues that once the U.S. Immigration and Customs Enforcement became involved and deportation proceedings were scheduled, the State no longer had jurisdiction and that the State should have deferred to the federal government. Additionally, Maria argues that DHHS

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[2] *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[3] *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

failed to comply with the Vienna Convention, article 37,[4] which provides in pertinent part:

> If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:
>
> . . . .
>
> (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments.

Maria argues that although the State did eventually notify the Guatemalan consulate, the notification was delayed and such delay defeated the purpose of the Vienna Convention. Alternatively, Maria maintains that despite the juvenile court's finding that the State complied with the Vienna Convention, the State failed to comply with statutory jurisdictional prerequisites. Thus, Maria argues the State did not have jurisdiction. We conclude that the juvenile court properly exercised jurisdiction over the child custody proceedings.

(a) Federal Jurisdiction Versus State Jurisdiction

[3,4] Our court has never addressed whether State courts have jurisdiction over child custody disputes when a parent involuntarily faces deportation. However, case law from other jurisdictions indicates that issues concerning child custody are within the province of state jurisdiction, not federal immigration jurisdiction, even when a parent involuntarily faces deportation.[5] The whole subject of domestic relations, and particularly child custody problems, is generally considered a

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[4] Vienna Convention, *supra* note 1.

[5] See *Johns v. Department of Justice of United States*, 653 F.2d 884 (5th Cir. 1981). See, also, *Huynh Thi Anh v. Levi*, 427 F. Supp. 1281 (D.C. Mich. 1977).

state law matter outside federal jurisdiction.[6] We cannot conclude, simply because a party to this case faces deportation, that federal immigration laws preempt this State's authority to decide matters involving child custody. We have stated that the jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants.[7] As such, the juvenile court properly exercised jurisdiction over Angelica and Daniel.

(b) Compliance With Vienna Convention and § 43-3804

Whether compliance with the Vienna Convention is a jurisdictional prerequisite to parental termination actions involving foreign nationals is an issue of first impression for this court. Although we were presented with the same issue in *In re Interest of Aaron D.*,[8] we declined to decide whether compliance with the Vienna Convention was jurisdictional. We reasoned that because the juvenile court erred in terminating the mother's parental rights, we did not need to address the mother's remaining assignments of error. However, because the mother raised a potential jurisdictional issue, we took note of her argument that the court lacked jurisdiction based on the State's failure to comply with the Vienna Convention. Additionally, we reasoned that the record was devoid of any evidence regarding whether the Mexican consulate had been informed of the termination proceedings, and as such, we concluded that we could not conduct a meaningful analysis.[9]

Other jurisdictions have considered the same issue and have concluded that compliance with the Vienna Convention is

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[6] See *Schleiffer v. Meyers*, 644 F.2d 656 (7th Cir. 1981), citing *In re Burrus*, 136 U.S. 586, 10 S. Ct. 850, 34 L. Ed. 500 (1890).

[7] *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992).

[8] *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

[9] *Id.*

not a jurisdictional prerequisite.[10] In *In re Stephanie M.*,[11] the California Supreme Court concluded that any delay in notice to the Mexican consulate did not deprive the California court of jurisdiction. In so concluding, the court analyzed and interpreted the language of the Vienna Convention to mean that the jurisdiction of the receiving state is permitted to apply its laws to a foreign national and that the operation of the receiving state's law is not dependent upon providing notice as prescribed by the Vienna Convention.

Other jurisdictions have concluded that state courts do not lose jurisdiction for failing to notify the foreign consulate as required by the Vienna Convention unless the complainant shows that he or she was prejudiced by such failure to notify.[12] Moreover, where there is actual notice, jurisdictions decline to invalidate child custody proceedings based on violations of the Vienna Convention.[13]

In the present case, the record presents conflicting testimony regarding whether and when the Guatemalan consulate was notified about Maria's case. Hannah testified that she sent notification to the Guatemalan consulate of Colorado, but letters from the Guatemalan consulate claim that no such notice was ever received. Based on Hannah's testimony that telephone calls were made and faxes were sent to the Guatemalan consulate and the fact that counsel was later appointed to represent the Guatemalan consulate, the juvenile court concluded that the State had complied with the Vienna Convention. The juvenile court specifically noted that regardless of whether compliance with the Vienna Convention was required, Hannah had made efforts to notify the Guatemalan consulate and did so in compliance with the Vienna Convention. An appellate court does

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[10] See *In re Stephanie M.*, 7 Cal. 4th 295, 867 P.2d 706, 27 Cal. Rptr. 2d 595 (1994).

[11] *Id.*

[12] See, *Breard v. Greene*, 523 U.S. 371, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998); *E.R. v. Office of Family & Children*, 729 N.E.2d 1052 (Ind. App. 2000).

[13] See *Arteaga v. Texas Dept. of Prot. and Reg.*, 924 S.W.2d 756 (Tex. App. 1996).

not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and considers it observed the witnesses.[14] As such, we consider that the juvenile court observed the witnesses and believed one version of the facts over the other. And assuming without deciding that compliance with the Vienna Convention is a jurisdictional prerequisite, we cannot say, based on the record before us, that the juvenile court's finding that the State complied with the Vienna Convention was erroneous.

But Maria argues that the State failed to comply with Neb. Rev. Stat. § 43-3804 (Cum. Supp. 2006) and that such compliance is also a jurisdictional prerequisite. At the time of the juvenile court's decision, § 43-3804(2) stated:

> The department shall notify the appropriate consulate in writing within ten working days after (a) the initial date the department takes custody of a foreign national minor or a minor holding dual citizenship or the date the department learns that a minor in its custody is a foreign national minor or a minor holding dual citizenship, whichever occurs first, (b) the parent of a foreign national minor or a minor holding dual citizenship has requested that the consulate be notified, or (c) the department determines that a noncustodial parent of a foreign national minor or a minor holding dual citizenship in its custody resides in the country represented by the consulate.

Section 43-3804 was enacted by the Legislature in 2006, after the children had been removed but before the juvenile court ordered that Maria's parental rights be terminated. Maria argues that § 43-3804 applies retroactively and that the State did not comply with § 43-3804. Because the State did not comply with § 43-3804, Maria argues that the juvenile court did not have jurisdiction.

[5,6] We have stated that to obtain jurisdiction over a juvenile, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within

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[14] *In re Interest of Tyler F., supra* note 3.

the asserted subsection of § 43-247.[15] As such, we conclude that § 43-3804 does not create a jurisdictional prerequisite to a juvenile court's exercise of jurisdiction. In other words, when the State fails to strictly comply with the requirements of § 43-3804, the juvenile court is not divested of its jurisdiction to make decisions regarding a juvenile of which it properly exercised jurisdiction under § 43-247.

In sum, we conclude that the juvenile court properly exercised jurisdiction over Angelica and Daniel.

2. Sufficiency of Evidence to Terminate Parental Rights

Before we consider whether the State proved by clear and convincing evidence that termination of Maria's parental rights was in Angelica's and Daniel's best interests, we take a moment and address certain issues regarding the dilemma we are presented with. First, we recognize that the children in this case have lived in the United States and with a seemingly healthy foster home for approximately 4 years. This delay was due, in part, to the difficulties inherent to Maria's location. Our decision in this case will undoubtedly have serious impacts on these children. However, we are faced with deciding whether the children should remain in the United States or be returned to Maria in Guatemala. With that in mind, we now turn to whether the State proved by clear and convincing evidence that termination of Maria's parental rights was in Angelica's and Daniel's best interests.

[7] It is axiomatic that under § 43-292, in order to terminate parental rights, the State must prove, by clear and convincing evidence, that one or more of the statutory grounds listed in this section have been satisfied and that termination is in the child's best interests.[16] And the proper starting point for legal analysis when the State involves itself in family relations is always the fundamental constitutional rights of a parent.[17]

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[15] *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008); *In re Interest of Brian B. et al.*, 268 Neb. 870, 689 N.W.2d 184 (2004); § 43-247.

[16] *In re Interest of Xavier H.*, *supra* note 2.

[17] *Id.*

[8-10] We have explained that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.[18] Accordingly, before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness.[19] "'[U]ntil the State proves parental unfitness, the child and his [or her] parents share a vital interest in preventing erroneous termination of their natural relationship.'"[20] In other words, a court may not properly deprive a parent of the custody of his or her minor child unless the State affirmatively establishes that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.[21]

[11-13] We have also explained that the fact that a child has been placed outside the home for 15 or more of the most recent 22 months does not demonstrate parental unfitness.[22] Instead, the placement of a child outside the home for 15 or more of the most recent 22 months under § 43-292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.[23] Regardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit and that the child's best interests are served by his or her continued removal from parental custody.[24]

[14] When considering whether removal from parental custody is in the best interests of the child, the determination requires more than evidence that one environment or set of

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[18] *Id.*

[19] See *id.*

[20] *Id.* at 348, 740 N.W.2d at 24-25, quoting *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

[21] See *In re Interest of Xavier H., supra* note 2.

[22] *Id.*

[23] *Id.* See *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

[24] See *In re Interest of Xavier H., supra* note 2.

circumstances is superior to another. Rather, the "best interests" standard is subject to the overriding presumption that the relationship between parent and child is constitutionally protected and that the best interests of a child are served by reuniting the child with his or her parent.[25] This presumption is overcome only when the parent has been proved unfit.[26]

The juvenile court in this case concluded that the State proved, by clear and convincing evidence, that Maria's parental rights ought to be terminated pursuant to § 43-292(6) and (7) and that such termination was in Angelica's and Daniel's best interests. We determine that the State failed to consider Maria's commanding constitutional interest, and the State failed to rebut the presumption that it is in Angelica's and Daniel's best interests to reunite with Maria.

The State presented several witnesses to testify at the termination hearing, but none of the State's witnesses were asked about Maria's parental fitness and nothing in the record establishes that Maria is an unfit parent. The State and the guardian ad litem argue simply that Maria's failure to provide medical care to Angelica—in two isolated instances—was sufficient to terminate her parental rights. We disagree.

[15] While we recognize and express concern over Maria's medical judgment, we disagree that such error in judgment warranted termination of her parental rights. We have repeatedly said that the law does not require the perfection of a parent.[27]

Maria crossed the border either pregnant or with a newborn infant. We do not know the details of Maria's circumstances while crossing the border, but, regardless, we do not conclude that Maria's attempt to bring herself and her child into the United States, in the belief that they would have a better life here, shows an appreciable absence of care, concern, or judgment. Because of a fear of being deported, and perhaps other circumstances of which we are unaware, Maria was hesitant to

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[25] *Id.*

[26] *Id.*

[27] *In re Interest of Xavier H., supra* note 2; *In re Interest of Aaron D., supra* note 8.

seek medical attention for Angelica when she was first born. The record is unclear when Maria became aware that Angelica was not thriving, but the record shows that Maria took Angelica for medical care by the time she was 1 month old. After that, Maria regularly sought medical care for her children, despite her ongoing fear of deportation. On these occasions, the children's illnesses were deemed not serious. When Maria failed to take Angelica to the followup appointment after she was diagnosed with RSV, Maria thought Angelica was getting better and also, she did not have a ride to the appointment. There is no evidence calling into question the sincerity of Maria's assessment of the medical situation. Maria made obvious mistakes in medical judgment, but they are insufficient lapses to establish her unfitness to parent. Moreover, Maria has demonstrated a continual willingness to learn more about how to avoid such mistakes in the future. After Angelica's initial visit to the doctor, which resulted in a 4-day hospital stay, Maria sought advice from Negrete on how to properly care for Angelica. And when Negrete advised Maria to take Angelica to the doctor in 2004, Maria did.

When Maria was questioned at the termination hearing about whether she knew how to provide Angelica with proper medical care, she testified that she would take Angelica to the hospital so the doctor can treat her. Additionally, Maria testified that she has access to free medications and hospitals within walking distance from her home. The evidence presented is that Maria would provide adequate medical care for Angelica and Daniel in Guatemala.

The evidence from the home studies is that Maria has established a stable living environment in Guatemala and can provide for all of her children's basic needs. They also indicate that Maria is a fit parent and that it would be in the best interests of Angelica and Daniel to be returned to Maria in Guatemala.

The juvenile court seemingly ignored the overwhelming evidence provided in the home studies, and the State failed to provide any testimonial evidence rebutting the indications of the two home studies. Instead, the State introduced testimonial evidence attempting to show that it would be in the children's

best interests to remain with their foster parents, because living in Guatemala would put them at a disadvantage compared to living in the United States. What we are dealing with here is a culture clash. However, whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children's best interests. We reiterate that the "best interests" of the child standard does not require simply that a determination be made that one environment or set of circumstances is superior to another.[28]

[16] We are mindful that Daniel has always lived in the United States and that Angelica has been in the United States since she was an infant. We also acknowledge that the children seemed to be doing well in their foster home. But unless Maria is found to be unfit, the fact that the State considers certain adoptive parents, in this case the foster parents, "better," or this environment "better," does not overcome the commanding presumption that reuniting the children with Maria is in their best interests—no matter what country she lives in. As we have stated, this court "'"has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide."'"[29]

The juvenile court expressed concern regarding the children's extended placement outside of the home and for their need to stay in foster placement, "the only circumstances that they have ever known." While we share the same concern regarding the children's extended foster placement, we must protect Maria's commanding constitutional interest. Maria did not forfeit her parental rights because she was deported. We note that this circumstance would not exist had the State allowed Maria to take the children with her to Guatemala. It is especially clear that as to Daniel, as soon as Maria was released from custody and awaiting deportation, Daniel could have been safely returned to her. At oral arguments, when the State was asked why Daniel was placed in custody, the State's only response was that it had received unsubstantiated reports of abuse. And as for Angelica,

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[28] *In re Interest of Xavier H., supra* note 2.

[29] *Id.* at 350-51, 740 N.W.2d at 26, quoting *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

the record reveals that while Maria was being detained by the U.S. Immigration and Customs Enforcement, Angelica received the medical care she needed and had recovered before Maria was deported.

The government of Guatemala has the resources to monitor the children's well-being and Angelica's rehabilitation, and, thus, the State has failed to prove that reunification while Maria continued with her case plan in Guatemala would endanger the children. Instead, the record demonstrates that the State made no efforts to reunify Maria and the children largely because DHHS thought the children would be better off staying in the United States. But so long as the parent is capable of providing for the children's needs, what country the children will live in is not a controlling factor in determining reunification.

[17] The State also maintains that Maria is unfit because she failed to comply with the case plan adopted by the court. It is the burden of the State, and not the parent, to prove by clear and convincing evidence that the parent has failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the case plan.[30] The State has failed to sustain its burden in this case. While it may be true that Maria did not strictly fulfill every detail of the case plan requirements, Maria clearly progressed, and any deficiencies in following the case plan are inadequate to prove unfitness.

From the beginning, the State was less than helpful in providing Maria with a compliable case plan. Although Hannah acknowledged that case plans are provided to Spanish speakers in their native language, Maria never received a copy of the case plan in her native language. There is no evidence in the record to suggest that Maria ever received a written copy of the case plan in any language—despite the fact that Hannah had access to Maria's address. Although the case plan was prepared in September 2005, Maria was never directly informed of the contents of the case plan until sometime in February 2006. At that time, Hannah simply read the plan over the telephone to Maria and then told her that she would have to take the initiative herself to comply with the case plan, because Hannah was

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[30] See *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999).

having a hard time setting up a parenting class or counseling. The record does not contain any evidence showing what efforts Hannah actually made.

Despite this notable lack of guidance on the part of DHHS, Maria progressed and generally complied with the case plan. Maria remained in contact with her children, by telephone, as required by the case plan. The record shows that there were telephone calls between Maria and the children approximately once a month. Additionally, the record shows that Maria has established and maintained a home for herself and her other children in Guatemala. Maria testified, and other evidence confirms, that she has everything her family needs, including running water, a bathroom, pots and pans, dishes, a kitchen table, and beds. Maria is employed, and there is no evidence in the record indicating that Maria associates with individuals involved in criminal activity.

The only two requirements Maria did not seemingly comply with included getting a psychological evaluation and completing a parenting class. Hannah testified that she never received any information indicating Maria was psychologically evaluated but that she did receive a general letter describing the concerns and living conditions of women in Guatemala. Our review of the record reveals that Hannah never informed anyone, including DeJesus, Vasey, or Maria, that the psychological report she received was not sufficient. When Hannah was asked why the case plan required Maria to receive a psychological evaluation, Hannah explained that it was just "common practice" to require it. The record does not indicate that Maria actually suffered from any psychological health issues which would affect her ability to properly care for the children or that the State was actually concerned with Maria's psychological health. As for the parenting classes, Hannah concluded that Maria had failed to comply with this requirement based solely on the failure to hear otherwise. Hannah explained that due to Maria's location, she could not monitor Maria's progress, and thus essentially placed the burden on Maria to show she had met the case plan requirements. We note that despite the fact that Maria was normally available by cellular telephone, Hannah never attempted to call and ask her how she was progressing with the case

plan requirements. Even when Maria was again present in the United States for the hearing, the State never even asked Maria the simple question of whether she had completed a parenting class.

Thus, at most, the State proved that Maria failed to submit to a psychological evaluation, which she seemingly understood had been satisfied and which the State admits was not necessary for Maria to become a fit parent. Otherwise, it is clear that Maria made a genuine effort to follow a case plan that was imposed upon her with little guidance. Her failure to follow the plan as thoroughly as DHHS desired is simply not probative of Maria's fitness to parent. The undisputed evidence is that she has been able to establish in Guatemala an appropriate living environment and that she can provide for her children, in accordance with the case plan.

As such, we conclude that the court erred in finding that the State established, by clear and convincing evidence, that termination of Maria's parental rights was in Angelica's and Daniel's best interests. First and foremost, a child's best interests are presumed to lie in the care and custody of a fit parent. The State failed to sustain its burden to prove by clear and convincing evidence that Maria is unfit. This evidentiary failure is related to the State's initial failure to make greater efforts to involve the Guatemalan consulate and keep the family unified. Because the State did not make this effort, it had scant evidence to support its claims that Maria was unable to care for her children.

[18] In conclusion, we are mindful that the children will be uprooted. But we are not free to ignore Maria's constitutional right to raise her children in her own culture and with the children's siblings. That the foster parents in this country might provide a higher standard of living does not defeat that right. Having so concluded, we do not address Maria's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.[31]

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[31] *Burke v. McKay*, 268 Neb. 14, 679 N.W.2d 418 (2004).

VI. CONCLUSION

We conclude that the State properly exercised jurisdiction over Angelica and Daniel. However, the State did not present clear and convincing evidence that termination of Maria's parental rights was in Angelica's and Daniel's best interests. We, therefore, reverse the judgment of the juvenile court terminating Maria's parental rights.

REVERSED.

WRIGHT, J., participating on briefs.

MILLER-LERMAN, J., not participating.

GERRARD, J., concurring.

I agree completely with the court's main opinion. I write separately because of my concern regarding DHHS' communications with the Guatemalan consulate in this case. I agree with the court's conclusions that compliance with Neb. Rev. Stat. § 43-3801 et seq. (Cum. Supp. 2006 & Supp. 2007) is not jurisdictional and that DHHS' notification of the Guatemalan consulate minimally satisfied the Vienna Convention on Consular Relations (Vienna Convention).[1] That does not mean, however, that minimal compliance is the standard to which DHHS and the juvenile court should aspire.

It must be remembered that the foremost purpose and objective of proceedings under the Nebraska Juvenile Code[2] is the protection and promotion of a juvenile's best interests.[3] The Legislature has recognized that early and active involvement of a foreign consulate is beneficial where the welfare of a foreign juvenile is concerned.[4] And the Vienna Convention represents the judgment of the United States, and 176 other governments,[5] that a consulate should be informed without

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[1] See Vienna Convention on Consular Relations, art. 37, Apr. 24, 1963, 21 U.S.T. 77, 102.

[2] Neb. Rev. Stat. § 43-245 et seq. (Reissue 2004, Cum. Supp. 2006 & Supp. 2007).

[3] See *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[4] See § 43-3801.

[5] See Office of the Legal Advisor, U.S. State Dept., Treaties in Force 330-31 (Jan. 1, 2009).

delay when a guardian appears to be in the interests of a foreign minor.[6]

Which makes perfect sense. This case, for instance, might have proceeded far differently had Guatemalan consular officials been appropriately and actively engaged in the process from the beginning. The result in this case—a rather startling departure from Maria's rights and the children's best interests—might have been prevented. This case illustrates why DHHS, and the juvenile court, should not regard § 43-3801 et seq. and the obligations of the Vienna Convention as simply another legal hoop to jump through on the way to termination. Rather, the involvement of a foreign juvenile's consulate should be regarded as important to promoting the juvenile's best interests. The full participation of the consulate can help the juvenile and the juvenile's parents by ensuring that their interests are represented, and can also assist DHHS, the guardian ad litem, and the juvenile court by providing information and experience helpful to determining the juvenile's best interests.

In other words, the apparent miscommunication in this case should not have happened, because if DHHS notifies a foreign consulate of a pending proceeding and receives no reply, DHHS should try again. And if DHHS does not, then the guardian ad litem or the juvenile court should act to ensure that the consulate is notified and involved. The children whose interests are at issue in these proceedings deserve effective notice and, hopefully, participation of their consulates. DHHS' cursory compliance with what was apparently regarded as a legal technicality falls short of the effort that should be made to protect and promote a child's best interests.

HEAVICAN, C.J., and CONNOLLY and STEPHAN, JJ., join in this concurrence.

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[6] See Vienna Convention, *supra* note 1.

COMMUNITY DEVELOPMENT AGENCY OF THE CITY OF MCCOOK, SUCCESSOR IN INTEREST TO COMMUNITY DEVELOPMENT AUTHORITY OF THE CITY OF MCCOOK, NEBRASKA, APPELLANT, V. PRP HOLDINGS, L.L.C., A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE.

767 N.W.2d 68

Filed June 26, 2009. No. S-08-983.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court independently decides questions of law.
4. **Contracts: Municipal Corporations: Improvements: Time.** Under Neb. Rev. Stat. § 18-2142.01(2) (Reissue 1997), a challenger has 30 days to contest the validity of an agreement reciting in substance that it has been entered into by a city, village, or authority to provide financing for an approved redevelopment project. After the lapse of 30 days, the agreement shall be conclusively deemed to comply with the purposes and provisions of Nebraska's Community Development Law and Neb. Rev. Stat. §§ 18-2145 to 18-2154 (Reissue 1997).
5. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.

Appeal from the District Court for Red Willow County: DAVID URBOM, Judge. Affirmed.

Michael L. Bacon and Steven P. Vinton, of Bacon & Vinton, L.L.C., for appellant.

Trent R. Sidders and Austin L. McKillip, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

SUMMARY

In 1998, the Community Development Agency of the City of McCook, Nebraska (the Agency), contracted with four redevelopers to eliminate blight through a redevelopment project. The contract required the redevelopers to convert a building that housed a YMCA facility into apartments.

As part of the contract, the Agency agreed to implement tax increment financing (TIF). TIF is a financial incentive local governments can give developers to help pay the costs of redeveloping blighted areas.[1] When a blighted area is redeveloped, the property tax revenue from the area should increase. One way local governments can provide TIF funds is to freeze the property tax base in the project area before any redevelopment takes place.[2] Any future property taxes which exceed the frozen amount are collected and placed in a trust fund. These funds are then used to pay redevelopment costs. This is the type of plan used by the Agency for the project at issue; under the contract's terms, the TIF funds are paid to the redevelopers, who advanced the money for the redevelopment.

Here, the issue is whether the appellee, PRP Holdings, L.L.C. (PRP)—which is a successor in interest to the redevelopers—should have the TIF funds. The appellant, the Agency, contends that as a successor in interest to the redevelopment contract, PRP is not entitled to the TIF funds.

The district court determined that under Neb. Rev. Stat. § 18-2142.01(2) (Reissue 1997), PRP should have the TIF funds, and entered summary judgment for PRP. Under § 18-2142.01(2), the Agency had 30 days after the parties formally entered into the redevelopment contract in 1998 to contest its validity. The Agency filed this declaratory judgment in 2006. We agree that § 18-2142.01(2) forecloses the Agency's challenge. We affirm.

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[1] *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999). See, also, Todd A. Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 Rev. Litig. 145 (1998).

[2] See Neb. Rev. Stat. § 18-2147 (Reissue 1997).

BACKGROUND

On September 11, 1998, the Community Redevelopment Authority of the City of McCook, Nebraska, predecessor of the Agency, entered into a redevelopment contract with the four above-mentioned redevelopers: Retro Development of Nebraska, Inc.; McCook YMCA Apartments I, Limited Partnership; Peter A. Spoto; and Douglas E. Hiner. The community redevelopment authority agreed to provide TIF funds for converting the YMCA building into apartments. The contract imposed obligations on the redevelopers and burdens on the property, which obligations bound successors. The contract established the tax valuation at $700,000. It also provided that neither the property's owner nor the owner's successors could challenge the valuation. In exchange, the redevelopers would receive TIF funds for advancing the money to complete the agreed construction.

McCook YMCA Apartments I, Limited Partnership (hereinafter YMCA), not only was a redeveloper under the contract, but also owned the YMCA building. Its ownership was subject to a deed of trust held by its secured lender, First National Bank (the Bank) of Omaha. The Bank was both the trustee and the beneficiary of the deed of trust. In 2005, YMCA defaulted on the deed of trust. Through a trustee's sale, PRP purchased the YMCA building from the Bank.

Since entering into the contract, PRP or its predecessors have paid property taxes at the valuation established in the contract. Under the redevelopment contract, taxes attributable to the property's increase in value above its valuation before the redevelopment have been paid into a special fund held by the Agency. The Agency, however, has not paid the TIF funds to the redevelopers.

In August 2006, 8 years after signing the contract, the Agency filed this declaratory judgment action. It sought to have the redevelopment contract declared void ab initio because the contract and its implementation failed to comply with Nebraska's Community Development Law (CDL).[3]

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[3] See Neb. Rev. Stat. §§ 18-2101 to 18-2144 (Reissue 1997). See, also, Neb. Rev. Stat. § 18-2153 (Reissue 1997).

Alternatively, the Agency asked the court to decide which party should receive the TIF funds. As of February 1, 2008, the Red Willow County treasurer had collected $42,454.79 in real property ad valorem taxes. The taxes on the property have continued to accumulate, and the McCook treasurer is holding accumulated TIF funds for the Agency.

The district court concluded that § 18-2142.01(2) foreclosed the Agency from contesting the contract's validity. Under § 18-2142.01(2), a challenger has 30 days to contest the validity of a redevelopment contract that provides financing for an approved development project. The record shows the Agency waited 8 years before filing suit.

But because PRP was not a signatory to the contract, the court concluded, the only rights it could have to the TIF funds stemmed from interests it purchased at the trustee's sale. The court determined that under Neb. Rev. Stat. § 76-1010(2) (Cum. Supp. 2008), PRP acquired all right, title, and interest of YMCA in the redevelopment contract through the trustee's sale. Thus, the court found PRP a successor in interest to YMCA's rights under the redevelopment contract.

The court concluded that because the redevelopment contract bound PRP to its restrictions, PRP should also have any benefits under the contract, including the TIF funds. The court granted PRP's motion for summary judgment and ordered the Red Willow County treasurer to pay the TIF funds to PRP under the terms of the contract. The Agency appeals.

ASSIGNMENTS OF ERROR

The Agency assigns, restated, that the district court erred in determining that PRP is a successor in interest entitled to TIF funds under the redevelopment contract. Specifically, the Agency asserts that the court erred in the following rulings: (1) The trustee's sale did not terminate YMCA's interest in the TIF funds; (2) the TIF funds were real property interests subject to conveyance through a trustee's sale; (3) PRP should have the TIF funds although it was not a signatory to the redevelopment contract; (4) PRP should have all the funds promised to the redevelopers, not just a percentage; and (5) the contract was not void ab initio.

STANDARD OF REVIEW

[1-3] We will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.[5] But the issue we are asked to decide—whether § 18-2142.01(2) applies—presents an issue of statutory interpretation, a question of law.[6] And when reviewing questions of law, we review the questions independently of the lower court's conclusions.[7]

ANALYSIS

[4] PRP argues that § 18-2142.01(2) forecloses all of the Agency's arguments because the Agency failed to contest the contract within 30 days. The statute provides in part:

> In any suit, action, or proceeding involving the validity or enforceability of any agreement of a city, village, or authority brought after the lapse of thirty days after the agreement has been formally entered into, any such agreement reciting in substance that it has been entered into by the city, village, or authority to provide financing for an approved redevelopment project shall be *conclusively deemed to have been entered into for such purpose and such project shall be conclusively deemed to have been planned, located, and carried out in accordance with*

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[4] See, *Jardine v. McVey*, 276 Neb. 1023, 759 N.W.2d 690 (2009); *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[5] See *id.*

[6] See *Lagemann v. Nebraska Methodist Hosp.*, 277 Neb. 335, 762 N.W.2d 51 (2009).

[7] See *id.*

> *the purposes and provisions of the* [*CDL*] *and sections 18-2145 to 18-2154*.[8]

The Legislature has set a specific window of time during which a party can challenge a redevelopment contract. Under the statute, after the window has closed, the contract has conclusively complied with the CDL and Neb. Rev. Stat. §§ 18-2145 to 18-2154 (Reissue 1997). In short, § 18-2142.01(2) provides finality and gives all parties to a contract that provides financing for a redevelopment project a green light to proceed. The only exception is if a suit or other proceeding is initiated within 30 days of the parties' formally entering into the contract.

The Agency and redevelopers entered into the redevelopment contract on September 11, 1998. The Agency concedes that it did not challenge the contract's validity or enforceability within 30 days after the contract was signed. The Agency filed for a declaratory judgment on August 3, 2006. Because the Agency failed to contest the contract's validity within 30 days of the parties signing the contract, § 18-2142.01(2) precludes the Agency from doing so now.

But the Agency argues, rather obliquely, that PRP cannot rely on § 18-2142.01(2) as a defense. It argues that only a party that has standing can rely on § 18-2142.01(2). It claims that PRP does not have standing because it has not been harmed. The Agency's argument wilts after a quick analysis.

[5] Standing "is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court."[9] Obviously PRP has an interest in the TIF funds. But it is the Agency as the party that initiated this suit that must meet the standing requirement—not PRP, who is a defendant. The Agency invoked the district court's jurisdiction and sued PRP as a possible successor in interest to the original redevelopers. The Agency's standing argument fails. The district court did not err in holding that

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[8] § 18-2142.01(2) (emphasis supplied).

[9] *Adam v. City of Hastings*, 267 Neb. 641, 646, 676 N.W.2d 710, 714 (2004).

§ 18-2142.01(2) precluded the Agency from contesting the contract's validity.

Because we conclude that the contract is valid, we next determine if PRP succeeded to YMCA's interest in the TIF funds through the trustee's sale. In the redevelopment contract, the Agency agreed to pay the four redevelopers part of the TIF funds. A "redeveloper" is "any person, partnership, or public or private corporation or agency which shall enter or propose to enter into a redevelopment contract."[10] The other three redevelopers the Agency contracted with have either failed to respond to this lawsuit or have disclaimed their interest in the TIF funds. PRP, as a possible successor in interest to YMCA, is the only potential redeveloper claiming an interest in the TIF funds.

In 2005, after YMCA defaulted on the deed of trust, its secured lender, the Bank, sold the redeveloped property to PRP at a trustee's sale. Although PRP is not a redeveloper under the CDL, it claims to have succeeded to YMCA's interest in the contract. But the Agency argues that YMCA's right to receive the TIF funds was terminated at the trustee's sale and was not conveyed to PRP. We understand the Agency's argument to be that because the redevelopment contract was recorded in 1999, the year after the Bank filed its deed of trust, the trustee's sale only terminated and did not convey YMCA's interest in the contract and TIF funds. In support of its position, the Agency cites § 76-1010(2), which provides that the sale of trust property operates to convey to the purchaser

> the trustee's title and all right, title, interest, and claim of the trustor and his or her successors in interest . . . in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the trustor or his or her successors in interest subsequent to the execution of the trust deed. All right, title, interest, and claim of the trustor and his or her successors in interest . . . including all such right, title, interest, and claim in and to such property *acquired by the trustor or his or her successors in interest subsequent to the execution of*

[10] § 18-2103(14).

> *the trust deed, shall be deemed to be terminated as of the time the trustee or the attorney for the trustee accepts the highest bid at the time of the sale*.

(Emphasis supplied.) The Agency argues that under the second sentence of § 76-1010(2), YMCA's interest in the TIF funds was terminated by the trustee's sale and not acquired by PRP. The Agency presents a sketchy argument at best. It can make this argument only by taking the quoted language out of context.

Under the first sentence of § 76-1010(2), the purchaser of trust property clearly acquires any interest the trustee has in the property. This includes any interest the trustor had in the property, whether acquired before or after the execution of the trust deed. The second sentence of the statute simply clarifies that the trustor and trustee retain no interest in the property after trustee's sale because their interest has been conveyed to the purchaser. As PRP suggests, the Agency's tortured interpretation of § 76-1010(2) would render it nonsensical and internally inconsistent. Under the Agency's interpretation, no trustor's interest could be conveyed to the purchaser.

At the trustee's sale, PRP acquired YMCA's rights, title, and interests in the redeveloped property. That interest included the obligations and benefits under the redevelopment contract. Under the terms of the contract, the original redevelopers agreed to redevelop the property, accept an artificially inflated tax valuation, and not sell the property to a tax-exempt entity. In return, the Agency agreed to pay the redevelopers the TIF funds. Thus, the redevelopment contract operates like a covenant.[11] We conclude that through the trustee's sale, PRP assumed YMCA's obligations under the redevelopment contract. Accordingly, it should receive any benefits payable under the contract. Because all other redevelopers have either disclaimed their interest in the TIF funds or have had default judgments entered against them, PRP is entitled to the TIF funds as successor in interest to YMCA. We have considered

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[11] See, generally, *Skyline Woods Homeowners Assn. v. Broekemeier*, 276 Neb. 792, 758 N.W.2d 376 (2008).

the Agency's other assignments of error and conclude they lack merit.

We conclude that § 18-2142.01(2) forecloses the Agency from contesting the redevelopment contract's validity. Because the contract is valid, PRP acquired YMCA's interest in the contract through the trustee's sale. All other redevelopers entitled to TIF funds under the contract have disclaimed or forfeited their interest in the funds. We conclude that the district court correctly determined that PRP, as YMCA's successor in interest, should have the TIF funds.

AFFIRMED.

WRIGHT, J., not participating.

IN RE INTEREST OF ELIAS L., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JENNIFER M. AND MICHAEL L., APPELLEES, AND THE PONCA TRIBE OF NEBRASKA, APPELLANT.

IN RE INTEREST OF EVELYN M., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JENNIFER M., APPELLEE, AND THE PONCA TRIBE OF NEBRASKA, APPELLANT.

767 N.W.2d 98

Filed June 26, 2009. Nos. S-08-1182, S-08-1183.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court decides independently of the determination made by the lower court.
2. **Interventions: Pleadings: Appeal and Error.** In considering a motion to intervene, an appellate court assumes that the petition's allegations are true.
3. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches conclusions independently of the juvenile court's findings.
4. **Federal Acts: States.** Generally, federal law preempts state law when it conflicts with a federal statute, when a state law does major damage to clear and substantial federal interests, or when the U.S. Congress explicitly declares federal legislation to have a preemptive effect.
5. **Indian Child Welfare Act: Jurisdiction.** When the state law affects Indian tribes, state jurisdiction over an action or issue is preempted if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

6. **Indian Child Welfare Act: Attorneys at Law.** The requirement that an Indian tribe be represented by a Nebraska licensed attorney in accord with Neb. Rev. Stat. § 7-101 (Reissue 2007) is preempted in the narrow context of state court child custody proceedings under the federal and state Indian Child Welfare Acts.

Appeals from the County Court for Dakota County: KURT RAGER, Judge. Reversed and remanded with directions.

Brad S. Jolly, of Smith & Jolly, L.L.C., for appellant.

No appearance for appellees.

Sarah Helvey and LaShawn Young for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Rosalynd J. Koob, of Heidman Law Firm, L.L.P., for amicus curiae Winnebago Tribe of Nebraska.

Mark C. Tilden, of Native American Rights Fund, for amici curiae National Indian Child Welfare Association et al.

Ben Thompson, of Thompson Law Office, L.L.C., for amicus curiae Omaha Tribe of Nebraska.

Jennifer Gaughan for amicus curiae Legal Aid of Nebraska.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The Ponca Tribe of Nebraska (Tribe) appeals from the county court's order denying its motion to intervene in child custody proceedings involving two children who are members of the Tribe. The court denied the motion to intervene because an attorney had not signed the motion. We reverse, and remand because the Tribe's right to intervene under the federal Indian Child Welfare Act (ICWA)[1] preempts Nebraska's laws regulating the unauthorized practice of law.[2]

The Nebraska Department of Health and Human Services filed two separate petitions in the Dakota County Court

[1] 25 U.S.C. §§ 1901 to 1963 (2006).

[2] See Neb. Rev. Stat. §§ 7-101 to 7-116 (Reissue 2007).

alleging that Elias L. and Evelyn M., both children of Jennifer M., are children in need of assistance under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). Because the children are "Indian children" under both ICWA and the Nebraska ICWA,[3] the Tribe was notified of the children's custody proceedings. The Tribe moved for intervention under § 1911(c), which provides that "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding."[4]

Jill Holt, the Tribe's ICWA specialist and an employee of the Tribe's Department of Social Services, and the Tribe's representative, filed the motion. No party objected. Yet, on October 9, 2008, the court refused to let the Tribe intervene. It ruled that the motion "is not filed in the Court's files pursuant to . . . § 7-101."

The court recognized that the Tribe had a right to intervene under ICWA and the Nebraska ICWA but determined that Holt was not an attorney licensed by the Nebraska Supreme Court to practice law in the State of Nebraska. The court stated that it "is charged with the duty to enforce the prohibition against the practice of law without a license." Because an attorney licensed to practice in Nebraska had not filed the motion, the court refused to recognize the motion.

The Tribe retained legal counsel and appealed. The Tribe assigns that the county court erred in concluding that § 7-101 prohibits it from intervening in an ICWA and Nebraska ICWA child custody proceeding without being represented by a Nebraska licensed attorney. The Tribe also assigns that the court erred in failing to conclude that § 1911(c), which gives an Indian child's tribe the right to intervene in an ICWA proceeding, preempts § 7-101 under the Supremacy Clause of the U.S. Constitution.

[1-3] Statutory interpretation presents a question of law, which we decide independently of the determination made

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[3] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008).

[4] Accord § 43-1504(3).

by the lower court.[5] In considering a motion to intervene, we assume that the petition's allegations are true.[6] Additionally, we review juvenile cases de novo on the record and reach conclusions independently of the juvenile court's findings.[7]

The federal ICWA and state ICWA are silent regarding whether a tribe may appear in court through a nonlawyer representative. Nebraska law allows plaintiffs "the liberty of prosecuting, and defendants . . . the liberty of defending," themselves.[8] But Nebraska does limit nonlawyer representation. Section 7-101 provides that

> no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. . . . It is hereby made the duty of the judges of such courts to enforce this prohibition.

Applying § 7-101, the county court refused to recognize the Tribe's motion to intervene because a Nebraska licensed attorney did not file the motion. But the Tribe argues that federal law preempts any Nebraska law which requires an attorney to represent the Tribe in ICWA proceedings.

[4,5] Generally, federal law preempts state law when it "conflicts with a federal statute,"[9] when a state law does "major damage to clear and substantial federal interests,"[10] or when

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[5] See *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007).

[6] See *Basin Elec. Power Co-op v. Little Blue N.R.D.*, 219 Neb. 372, 363 N.W.2d 500 (1985).

[7] See *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

[8] § 7-110.

[9] *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 503, 667 N.W.2d 222, 232 (2003) (citing *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002)).

[10] *Collett v. Collett*, 270 Neb. 722, 728, 707 N.W.2d 769, 774 (2005).

the U.S. Congress explicitly declares federal legislation to have a preemptive effect.[11] But that is not the preemption standard here. When the state law affects Indian tribes, courts must make "'a particularized inquiry into the nature of the state, federal, and tribal interests at stake.'"[12] In such cases, state jurisdiction over an action or issue is preempted if "it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[13]

Here, we first determine whether the state law requiring that an attorney represent the Tribe in ICWA proceedings "interferes or is incompatible with" the Tribe's right to intervene. If an interference or incompatibility appears, then we must balance the competing state and tribal interests.

The Tribe argues that conditioning tribal intervention on whether an attorney represents it would significantly interfere with its ability to intervene. The Tribe claims it lacks sufficient financial resources to retain legal counsel to represent it in state court child custody proceedings governed by ICWA. By implication, if the Tribe cannot intervene, its rights and interests in the Indian child would go unrepresented.

The Tribe claims that its primary source of funding for child and family services comes from federal grants and contracts. But some doubt exists whether a tribe can use federal child welfare funds to support legal representation for the tribe in child custody proceedings.[14] The Tribe claims that it lacks financial resources outside those provided by the federal government and cannot independently pay for legal counsel. The Tribe claims that because of these economic barriers, any

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[11] See *Zannini*, *supra* note 9.

[12] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)).

[13] *New Mexico*, *supra* note 12, 462 U.S. at 334. See, also, *In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008); *State ex rel. Juv. Dept. v. Shuey*, 119 Or. App. 185, 850 P.2d 378 (1993).

[14] See, e.g., § 1931(a)(5) and (8); 25 C.F.R. §§ 89.40 and 89.41 (2008). See, also, *In re N.N.E.*, *supra* note 13; *Shuey*, *supra* note 13.

requirement that tribes appear with legal counsel interferes with the Tribe's right to intervene. We find the Tribe's argument persuasive.

Federally recognized Indian tribes, while possessing unique attributes of sovereignty and self-government,[15] lack many of the revenue-generating options open to federal and state governments.[16] And we must be cognizant of the hardship that would occur if we were to require tribes to hire attorneys in ICWA matters. Requiring legal counsel to represent the Tribe in ICWA proceedings would place additional financial burdens on the Tribe which would directly interfere with its right to intervene. Thus, we conclude that enforcement of § 7-101 in this case interferes and is incompatible with the federally granted tribal right of intervening in child custody proceedings governed by ICWA.

We next address whether the State's interest in enforcement of the representation requirement in ICWA proceedings outweighs tribal interests in intervening in such proceedings. Because requiring legal counsel as a condition of intervention under ICWA would, at a minimum, burden the Tribe's right of intervention, the State can require legal representation only if the State's interests outweigh those of the Tribe and the United States.[17]

Obviously, the State has a legitimate interest in requiring groups and associations to be represented by an attorney. Section 7-101 ensures that those appearing in judicial proceedings are familiar with substantive and procedural requirements and protocols, thus ensuring adequate representation.[18] By limiting the practice of law to only licensed attorneys, the State's goal is to protect the public from any potential harm caused by

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[15] *United States v. Wheeler*, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978) (superseded by statute as stated in *U.S. v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998)).

[16] See, generally, 42 C.J.S. *Indians* § 140 (2007); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001).

[17] *New Mexico*, *supra* note 12.

[18] See *Shuey*, *supra* note 13.

the actions of nonlawyers engaging in the unauthorized practice of law.[19]

Yet, Nebraska law allows individuals to represent themselves and participate in trials and legal proceedings in their own behalf.[20] And, an employee of an organization can engage in certain acts that would normally constitute the practice of law if done for the sole benefit of the organization.[21] Additionally, a nonlawyer may engage in the authorized practice of law to the extent allowed by a published opinion or rule of this court.[22] So, while the general rule may be that only an individual can appear pro se in his or her own behalf,[23] statutes and court rules provide some exceptions.

Furthermore, the Tribe has significant interests in intervening in ICWA proceedings. Congress passed ICWA in response to the alarmingly high number of Indian children being removed from their families and placed in non-Indian adoptive or foster homes by state welfare agencies and courts.[24] At the time of ICWA's enactment, 25 to 35 percent of all Indian children were removed and separated from their tribes and families to be placed in adoptive or foster homes.[25] To make matters worse, about 90 percent of Indian adoption placements occurred in non-Indian homes away from their culture and community.[26]

Commenting on the loss of Indian culture, Congress noted that "[c]ontributing to this problem has been the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and

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[19] Neb. Ct. R., ch. 3, art. 10, Statement of Intent.

[20] § 7-110.

[21] Neb. Ct. R. §§ 3-1001 and 3-1004(N).

[22] Neb. Ct. R. § 3-1004(W).

[23] Compare §§ 7-101 and 7-110. See, also, *Osborn v. United States Bank*, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824).

[24] *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

[25] *Id*.

[26] *Id*.

the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future."[27] Ultimately, Congress enacted ICWA in response to the looming crisis facing Indian tribes—namely, that they would face extinction through the removal of their children through state court child custody proceedings. Congress concluded that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[28] Thus, Congress designed the procedural and substantive standards of ICWA to "'protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'"[29] The Tribe's right to intervene in state court child custody proceedings provides a means to achieve this goal.

Moreover, other state courts have concluded that the tribal interests articulated in ICWA are of the highest order, outweighing other state interests. The Utah Supreme Court stated that "[t]he protection of th[e] tribal interest [in its children] is at the core of the ICWA."[30] The Iowa Supreme Court, concluding that an Indian tribe may represent itself in ICWA proceedings, determined that the state's interest in requiring adequate representation "'cannot compare with a tribe's interests in its children and its own future existence.'"[31]

And, in the narrow context of ICWA proceedings, the State's interests are not necessarily compromised by allowing the Tribe to be represented by a nonlawyer. In this case, the Tribe has authorized Holt, its ICWA specialist, to appear on its behalf and has entrusted her with representing its interests in ICWA proceedings. Her responsibilities require familiarity with the procedural and substantive requirements of ICWA, and familiarity with other social service agencies that are a part of the

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[27] H.R. Rep. No. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541. See, also, § 1901(5).

[28] § 1901(3).

[29] See *Holyfield*, *supra* note 24, 490 U.S. at 37.

[30] *Matter of Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986).

[31] *In re N.N.E.*, *supra* note 13 at 12.

state child custody proceedings. In sum, the Tribe has authorized her to speak for it, and she is familiar with the applicable law and procedures.

[6] We conclude that tribal participation in state custody proceedings involving Indian children is essential to achieving the goals of ICWA. The tribal interests represented by ICWA and the Tribe's right to intervene under § 1911(c) and § 43-1504(3) outweigh the State interests represented by § 7-101. Under the applicable preemption test, the scale tips in favor of tribal interests. Thus, we determine that federal law preempts the requirement of § 7-101 that the Tribe be represented by a Nebraska licensed attorney in these ICWA proceedings. On remand, the court shall allow the Tribe's designated representative to fully participate in further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

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